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NOTES.

WE believe that many of our learned friends, especially in America, will be glad to possess an authentic portrait of Blackstone. Accordingly we mark the entrance of the LAW QUARTERLY REVIEW on its seventh year of publication by issuing with this number a permanent photograph of the well-known statue of Blackstone in the library of All Souls College, Oxford. We also hope from time to time, at such intervals as may be found practicable, to issue in like manner portraits of our principal contributors.

We do not think the profession will be thankful for the change in the official style of the Law Reports. The incorporation of the date in the reference is well meant; but the importance of making references short and simple appears to have been overlooked. And the Council of Law Reporting have lost the opportunity of effecting an improvement often urged upon them, the separation of the Court of Appeal cases from cases decided in Courts of first instance, of which latter far too many are reported. The general management of the Law Reports has been anything but satisfactory for some years past, and we see no signs of mending.

The judgment of the Divisional Court in the Castioni case decides the most important question which has arisen on the Extradition Act of 1870. It was evident that the exception of 'offences of a political nature' in the Act does not relate to crimes of a purely political kind, such as sedition or some kinds of treason; for these crimes are not included in the schedule of offences for which extradition can be granted, and the exception, if it relates to them, is unnecessary and therefore meaningless. The Court had

therefore to decide under what circumstances crimes, otherwise extraditable offences, become political offences. They held unanimously, following Mr. Justice Stephen's definition in his History of the Criminal Law (vol. ii. pp. 70, 71), that they become such when incidental to and forming a part of political disturbances. If I understand the definition in the History of the Criminal Law rightly, it excludes crimes committed with a political motive, unless forming part of political disturbances. Therefore it seems that what is popularly called 'political assassination,' namely, the deliberate murder of a political personage for political reasons, is an extraditable offence, although this point was not involved in Castioni's case, and was not dealt with in terms by the Court.

During the argument Mr. John Stuart Mill's definition of a political offence as 'any offence committed in the course of or in furtherance of civil war, insurrection, or political tumult,' was cited. But the Court emphatically condemned the doctrine that any offence committed during an insurrection acquired a political character. 'If,' said Mr. Justice Hawkins, 'one of those who took part in an insurrection were to kill some one from private motives, or to shoot an unoffending man standing in his own doorway, he would not be protected from extradition.' The limitation is reasonable, but might sometimes be difficult of application.

One other point remains to be noticed. It was argued that the killing of Councillor Rossi was a wanton act, not necessary to further the purpose of the insurgents. It was no doubt a cruel and unnecessary deed; for the resistance of the Cantonal authorities was purely passive. But Castioni had no private spite against Rossi, whom he did not even know, and the Court, believing that the act was done in furtherance of the rising, ordered his release. Therefore if, in the heat of a political disturbance, even unnecessary acts of violence are done from genuine political motives, they fall within the exception of political offences.

E. L. DE HART.

Tilbury v. *Silva*, 45 Ch. Div. 98, is perhaps chiefly interesting in that it marks, we believe for the first time, the limits beyond which the extension of the law made by the House of Lords in *Goodman* v. *Mayor of Saltash*, 7 App. Ca. 633, cannot be relied on to support claims of right founded on quasi-customary usage. The Court may strain a point to find a legal origin for usage shown to be continuous and ancient; it cannot be expected to do so when the usage is modern and the facts explicable otherwise. By the way, the Law Reports head-note '*Goodman* v. *Mayor of Saltash* . . .

distinguished by Kay J.' is misleading. Though the point was not urged in the Court of Appeal, and the case not expressly cited by the Lords Justices, yet the matter is clearly dealt with in all their judgments.

It would be a bold thing to dissent, as matter of law, from the concurrent opinions of Stirling J. and the Court of Appeal in *Windhill Local Board of Health* v. *Vint*, 45 Ch. Div. 351. But one may be allowed to doubt whether the results of the decision will be convenient. Its effect is that a compromise of a prosecution for any public misdemeanor whatever is illegal, though the misdemeanor do not include any but a technical breach of the peace, and the compromise be entered into not for any private benefit to the prosecutor, but wholly with a view to the public benefit and in order to secure that the law shall in fact be obeyed. We gravely mistrust the extension of such principles of strictly criminal law to an indictment for interfering with a highway, which in substance is a matter of civil administration.

Thynne v. *Shove*, 45 Ch. D. 577, decides that an assignment of goodwill on the sale of a business, without any express words as to the right to use the name, entitles the buyer to use the seller's name only 'so long and so far as he does not by so doing expose him to any liability, but no further.' Thomas Nokes, if he has bought John Stiles's goodwill, may tell the world that he is the successor to John Stiles, but may not use the name of John Stiles without qualification, so that people might suppose Stiles to continue a member of the firm and liable for its debts. In *Levy* v. *Walker*, 10 Ch. Div. 436, there was nobody who could be exposed to liability by the continued use of the firm-name. The Law Reports head-note is long and clumsy, as usual, and the more without excuse when Stirling J. has stated the legal point in the neat and precise form above cited.

De Francesco v. *Barnum*, 45 Ch. D. 430, should be read together with a report of what is really another phase of the same dispute, 43 Ch. D. 165. The result, flowing from a combination of the judgments given by Lord Justice Fry and by Justice Chitty respectively, may be thus summed up.

1. An action cannot be brought against an infant on a covenant to serve (see Croke, Car. 179). Hence

2. The negative clauses in an apprenticeship deed cannot be enforced by injunction.

3. Where the provisions in an apprenticeship deed are unreasonable, and cannot be enforced against the infant or the infant's parent, *A*, the infant's master and teacher, cannot maintain an action against *X* for enticing away the infant from his employment.

These decisions are important. They show that the Courts are fully alive to the danger of turning contracts of service into contracts of slavery, and that the principle of such cases as *Lumley* v. *Gye*, 2 E. & B. 216; *Bowen* v. *Hall*, 6 Q. B. Div. 333, will scarcely be extended, and is certainly limited by the strictly logical qualification that *X* cannot be sued for inducing *N* to break a contract if the contract be one by which *N* is not bound.

Jay v. *Robinson*, 25 Q. B. Div. 467, decides an interesting point as to the liability of a married woman on her ante-nuptial contracts. *X* has been married to *M*, and during the continuance of the marriage contracts a debt for which her separate estate is liable. The marriage is dissolved by divorce. She then marries *N*, and at the time of her second marriage property then brought by her into settlement is settled upon her for life subject to a restraint on anticipation. *X* contends that the property thus settled is, under the Married Women's Property Act, 1882, s. 19, not liable for the debt contracted during her marriage with *M*, on the ground that it is not a debt contracted before marriage. The Court of Appeal however have rejected the contention on the sensible ground that the words 'before marriage' do not mean 'before ever having been married,' but before the marriage existing at the time a married woman's liability is under consideration. The conclusion is satisfactory. The matter which is preeminently unsatisfactory is the number of nice and arguable points raised or raisable on the construction of the Married Women's Property Act, 1882. They cannot be got rid of by any improvement in drafting; they can be removed only by the adoption of the broad principle that a married woman's rights and liabilities are the same as those of a *feme sole*.

The public are likely to be startled by the judgment of Lopes L.J. in *Gordon* v. *Silber*, 25 Q. B. D. 491. It certainly seems odd at first sight that an innkeeper who receives a husband and wife as guests at his hotel and trusts to the husband for payment of the hotel bill, should be able to retain the wife's separate property as security for debts not incurred by her. Let no one however suppose that the rights of a married woman under the Married Women's Property Act, 1882, have been infringed. An innkeeper is compelled under

certain limitations to receive every person who offers himself as a guest and to keep his goods for him. As a compensation the innkeeper has a lien upon the goods of his guest until the guest's hotel bills be paid, and this lien affects the goods brought by the guest even though they in fact belong to a third party. It almost necessarily follows that where a husband and wife come to an inn together bringing luggage with them, their host who cannot know which goods belong to the husband, and which to the wife, has a lien upon the whole. An innkeeper however would be ill-advised who, relying upon the authority of *Gordon* v. *Silber*, acted on the principle that he could always retain the goods of a married woman as security for her husband's hotel debts. Under easily conceivable circumstances he might know that the goods were hers and were not brought to the inn as her husband's property, and might therefore, it is submitted, have no lien upon them for the husband's debts. Lord Justice Lopes' decision curiously illustrates the difficulty due not to any rule of lw but to the nature of things of treating the property of a wife as in all cases absolutely distinct from that of her husband.

'The plaintiff, however, was induced by the certification to part with his money, and he has lost it, and, if an action would lie for a careless misrepresentation, I should be of opinion that the plaintiff could recover the money thus lost from the defendants. But no action lies for such a misrepresentation. This was finally decided in *Peek* v. *Derry*, [14 App. Ca. 337], which it is not for me to criticise.' This is the language of Lord Justice Lindley, a judge whose words always deserve attention; it exactly hits off the effect of *Peek* v. *Derry*. No action lies for merely careless misrepresentation. *Bishop* v. *The Balkis &c. Co.*, 25 Q. B. Div. 512, in which the passage cited from the judgment of Lindley L.J. occurs, illustrates the practical effect of the principle he enunciates. *A* purchases shares from *M* on the faith of a 'certification' from the secretary of the company in which *M* was a shareholder that a certificate of the shares had been lodged with the company. This statement, though made in good faith, is made carelessly and turns out untrue. The secretary is acting within the scope of his employment, but *A*, who has lost his money through trust in the certification, has no remedy.

Harris v. *Knight*, 15 P. Div. 170, may be good law, probably it is so, as the decision given in the case was that of Lindley and Lopes L.JJ. The judgment of the Court was however dissented

from by Lord Justice Cotton. One thing is certain. *Harris* v. *Knight* extends the dangerous principle sanctioned by *Sugden* v. *Lord St. Leonards*, 1 P. Div. 154. It establishes that the due execution no less than the contents of a lost will may be orally proved, though the circumstances under which the proof is given are highly suspicious, and the will is not propounded for probate till years after its alleged execution, and until after the death of every person whose evidence could be absolutely decisive. It will soon be time for the Legislature to consider whether the policy of the Wills Act which is intended to subject testamentary dispositions to rigid formalities has not been undermined by the judicial legislation of the Courts. No one will doubt that the policy of the Legislature is sound.

Nunneley v. *Nunneley*, 15 P. D. 186, decides that the English Divorce Court has, on a dissolution of a marriage celebrated in Scotland between a Scotchwoman and a domiciled Englishman, the right, under 22 & 23 Vict. c. 61, s. 5, to vary a settlement made in accordance with Scotch law. The decision is a fair deduction from the principle that the marriage of a Scotchwoman with a husband domiciled in England is an 'English marriage' (conf. *Harvey* v. *Farnie*, 8 App. Ca. 43), but may give rise to one of those contests between the doctrines of the English and the Scotch with regard to the extra-territorial extension of law which have before this perplexed the House of Lords.

Money-lending forms a large part of the business of life insurance companies. It serves a double purpose in bringing them business, and furnishing them at the same time with profitable investments for their enormous funds. Hence the decision in *Northampton* v. *Pollock* (45 Ch. Div. 190) touches the offices nearly. In reading the case, we have an uneasy feeling of being involved in that form of fallacy known as the argument in a circle: thus, the borrower covenanting to pay the premiums (though they were advanced as a matter of book-keeping by the office), showed that the policy was his property: therefore it was part of the security; argal, as Touchstone would say, the agreement that it should belong to the office was a bye-agreement clogging the equity of redemption, and as such void. But what if the borrower paying the premiums only raised a presumption of the policy being his? Then this presumption was rebutted by the express agreement, and the policy was outside the security altogether, and was left untouched by the equitable rule 'once a mortgage always a mortgage.' This was the

dissenting view of Lord Justice Bowen, and was, to say the least, extremely plausible.

It is noticeable that this is the third time quite lately that the doctrine of clogging the equity of redemption has been before the Courts (*Mainland* v. *Upjohn*, 41 Ch. D. 126; *James* v. *Kerr*, 40 Ch. D. 449). The doctrine was devised for the protection of mortgagors against oppressive bargains in the old days, when mortgagors were or were supposed to be at the mercy of unconscionable money-lenders. In these days of cheap money seeking investment the mortgagor, if not master of the situation, can safely be trusted to take care of himself. Courts of Equity, as Lord Bacon says, must beware lest, under pretence of mitigating the rigour of the law, they cut its sinews and weaken its strength.

If the test of a lunatic's criminal liability is 'Could he help it?' the test of contractual capacity is 'Did he understand it?' A person suffering from delusions need not, according to the modern doctrine, be incapacitated from doing business, if the delusions did not influence him in the particular case (*Banks* v. *Goodfellow*, L. P., 5 Q. B. 549). Though the mind is one and indivisible, its faculties, like the functions of the body, seem localised, so that a lunatic who is not responsible for his actions may yet paint pictures of considerable merit. When an old gentleman of eighty, however, suffering not only from delusions but organic disease of the brain, sells an estate for £25,000, his executors may well be justified in resisting specific performance (*Birkin* v. *Wing*, 63 L. T. R. 80). Kekewich J. started with the rather strange assumption that it requires more capacity to make a will than a contract; in other words, to give away rightly than to get fair value for a thing. However this may be, the policy of the law in either case is the same 'ut res magis valeat quam pereat,' but the difference is that in wills it is for the person propounding to prove the sound disposing mind and discretion, in contracts the contract is valid till rescinded. In the case in question Kekewich J. upheld the contract, finding capacity and nothing unfair. It is noticeable that in doing so he relied on the lay evidence against the medical. A man's solicitor may be a better judge of his capabilities than his doctor. In spite of physiologists, logicians, and metaphysicians 'the operations of the understanding,' whether in health or disease, are still a great mystery, and till we know more about them, our present theory about lunatics' contracts or wills must be regarded as only provisional.

The moral which *Bell Cox* v. *Hakes* (63 L. T. R. 392) points is the peril of incautious law-making in the present complex, not to say chaotic, state of our law. Here we have the Legislature giving away, or nearly giving away, our cherished immemorial liberties as embodied in the writ of Habeas Corpus by an obscure section in the Judicature Act. Yet so highly did the old law value this guarantee of the liberty of the subject that a man might go from court to court till he obtained his liberty, and if he got it from any, no other court could interfere. Nothing probably was further from the mind of the Legislature than to derogate from this ancient privilege, but the mind of the Legislature is what its language read by the ordinary canons of construction yields, and so regarded the Law Lords had great difficulty in extricating themselves from the generality of section 19. The rationale of the section is, as Lord Bramwell put it, that the Legislature was engaged in establishing a Court of Appeal, not in making matters appealable which were not appealable before. How, moreover, is a Court of Appeal to undo the order of discharge? 'The body is gone.' 'Solvitur ambulando.' It is satisfactory to know that a discharge is unappealable, though there is no reason to suppose a different decision would have brought about a dangerous constitutional crisis. We can afford to regard the Habeas Corpus Act with much the same feeling that we do the old 'Victory' lying in Portsmouth Harbour. It has borne the constitutional battle and the breeze. It is no longer wanted for active service. 'Requiescat in pace.'

The freedom of married women broadens slowly down from precedent to precedent. Thus a wife who has lent money to her husband for the purposes of his trade may as executrix retain his debt out of the assets though the estate is insolvent, for s. 3 of the Married Women's Property Act, 1882 only postpones her right of *proof* in bankruptcy, and (by force of s. 10 of the Judicature Act, 1875) in administration of assets, but does not touch her right of retainer. This priority is a valuable privilege, considering how many wives there must be who help their husbands with their separate property. But married women must take the burden with the benefit. In *Whittaker* v. *Kershaw* (45 Ch. Div. 320) a married woman as residuary legatee accepted a transfer of shares from the executor, but declined to repay calls which the executor had been forced to pay on the shares. Perhaps long immunity has made married women a trifle unconscionable: perhaps she relied on there being no *contract* of indemnity. If so she was leaning on a broken reed.

The Act says that a married woman shall be capable of being sued as a *feme sole* either in contract or in tort 'or otherwise.' The meaning of this, as Fry L.J. expressed it, is that she is to be liable as if she were a man. This is logical. It is not logical that a married woman's capacity to contract should still depend on her having separate property. Property has nothing to do with capacity, though it has to do with payment, but it is for people who deal with her to find out, as they would in case of a man, whether she can pay.

Discovery is a very valuable part of the machinery of a modern action, yet no part of that machinery has been more abused. The privilege of interrogating the conscience of an opposite party is one of a very inquisitorial character. It originated as a form of equitable relief, and as such it is still subject to equitable rules. If a party ordered to make an affidavit of documents swears that he has no documents but what relate to his own title, his oath ought to be conclusive of the question. In answers to interrogatories it is, but there is this difference between answers to interrogatories and an affidavit of documents, that in the former the deponent is pledging his oath to what he knows, in the latter he is pledging his oath as to the relevancy of documents, a point on which he may easily form a mistaken opinion. An affidavit of documents is therefore not necessarily conclusive if from the affidavit itself or from the documents therein referred to, or from an admission in the pleadings, the Court sees reason to think that the documents are relevant (*Jones* v. *Montevideo Gas Co.* (5 Q. B. Div. 556, &c.). Otherwise it is conclusive. Yet parties are constantly trying to get behind the affidavit by interrogatories or a further affidavit. It is therefore satisfactory to find the House of Lords upholding its conclusiveness (*Morris* v. *Edwards*, 15 App. Cas. 309). It is sufficient for the deponent to swear that the documents do not help the interrogating party's case. He need not add that they do not impeach his own case. If they impeach the deponent's case so as to aid the interrogating party, they *do* help him. If they impeach the deponent's case only so as to aid some third party, that is no business of the interrogating party.

Whether if the Mortmain Acts were repealed to-morrow languishing and dying persons would be found endowing the Church or charities to the disherison of their lawful heirs, or whether if they occasionally did so it would be very disastrous to the country in these socialistic days, may be very well doubted.

'Through the shadow of the past we sweep into the younger day,' but in this matter of Mortmain we have not yet emerged from the shadow cast by a dead priestcraft and the exigencies of an extinct feudal system. Scarcely a day passes but deserving charities are disappointed, not to say defrauded, of just benefactions by an extravagant jealousy of their becoming landowners, or acquiring in the remotest way an interest in land, and not even equity will raise a hand to marshal assets in their favour. Latterly the Courts have struggled to minimise the evil, but it was more by a lucky accident than anything else that the gift of the bonds of a municipal corporation, in *Bedford* v. *Teal* (45 Ch. Div. 161), did not fail,—the accident that the bond charged not the borough fund (which arose partly from rents), but only the surplus of it.

The Mortmain Acts were due to exceptional conditions, a barrier against the rising flood of thirteenth-century ecclesiasticism, what we call now in France an anti-clerical demonstration. It was a wise and just precaution at a time when half the land in the kingdom was in the hands of religious houses. Has it not become in these days an anachronism?

Spelling out a contract from informal correspondence requires great care, and on this point *Hussey* v. *Horne Payne* (4 App. Ca. 311) supplies a very necessary caution in laying down the rule that the whole correspondence must be looked at and not a few letters picked out to make a contract; but it does not appear that the judges in that case ever meant to say that if, at a certain point in the correspondence, you find a complete contract, it is to lose its binding force because the parties go on to negotiate about other matters; if, for instance, *B* agrees to buy a house of *A* under an open contract, and then *A* writes to say that the title will begin with a will only twenty years old, and that he sells subject to an existing tenancy, and a controversy between the solicitors ensues, this will not affect the original contract. *A*'s attempts to vary the contract are simply nugatory, but of course *B* may rescind (*Bellamy* v. *Debenham*, 45 Ch. D. 481). This case comes opportunely to qualify the dangerous dictum of Kay J. in *Bristol Bread Co.* v. *Maggs* (44 Ch. D. 616), which, if followed out, would go far to neutralise all contracts by correspondence. The truth in the dictum is this, that the subsequent negotiation is evidence to show that there never was a concluded contract.

To get the law on any given point, as it was, as it is, and as it ought to be, into right focus, so to speak, is a far from easy matter,

even on such an elementary point as a sportsman accidentally shooting a beater (*Stanley* v. *Powell*, 39 W. R. 77). The fundamental idea, historically, of the early law of torts is reparation for injury, not necessarily for wrong. The injured person forgoes his customary right of revenge or retaliation in consideration of compensation. Whether the injury was wilful or accidental involves a difficult psychological inquiry, and makes in the result no difference to him. As this primitive idea fades into the background and a higher platform of justice is reached, the degree of the tortfeasor's responsibility receives recognition, and the theory of negligence is developed. But the older idea which regards the injury done rather than the mind or conduct of the doer is still found running through the cases. 'If,' said Lord Bacon (founding himself on 21 Hen. VII. 28), 'a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course, but if a man be hurt or maimed only' (so that the personal action did not die with him) 'an action of trespass lieth though it be done against the party's mind and will.' This is very strong, for shooting at butts was at the time a statutory obligation. *Weaver* v. *Ward* (Hob. 134) is still stronger. 'If a lunatic hurt a man he shall be answerable in trespass.' 'By *injuria*,' says Willes C.J. (*Winsmore* v. *Greenbank*, Willes R. 577, 581), 'is meant a tortious act: it need not be wilful and mischievous, for though it be accidental, if it be tortious an action will lie.' Thus where a man was looking at another uncocking a gun, and the gun went off accidentally and wounded him, trespass was held to lie (Bull. N. P. 16). Lord Cranworth frankly recognises the principle and treats it as good law and good sense. 'In considering,' he says, 'whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution but whether his acts have occasioned the damage. . . . And the doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer' (L. R. 3 H. L. 341). In those large classes of cases conveniently summed up under the 'Duty of insuring safety,' and in the liability of owners and occupiers of fixed property, this rule still remains part of the living law of the land. As often as the British juryman persists in giving damages against a railway company without any evidence of negligence he is unconsciously acting on the same rudimentary notion of justice. *Rylands* v. *Fletcher* (L. R. 3 H. L. 330) is the parting of the ways; this way the law of negligence, that way the duty of insuring safety. Prior to *Rylands* v. *Fletcher* the distinction between things dangerous in

themselves and things not so was not clearly taken, and the obligation of persons dealing even with dangerous things was rather to use consummate care. Thus in *Weaver* v. *Ward* (Hob. 134), where one of a train-band in exercising had shot his fellow accidentally, the Court held that in trespass no man shall be excused 'except it may be judged utterly without his fault.' 'Inevitable accident' (*Scott* v. *Shepherd*, 3 Wil. 403) and 'inevitable necessity' (*Dickenson* v. *Watson*, Sir T. Jones 205) were other modes of expressing the same idea. *Rylands* v. *Fletcher* raised the duty of consummate care to the duty of insuring safety, but in doing so it limited it in a very rational way by restricting it to things 'extra-hazardous,' such as wild beasts, fire, flood, water, &c.

It is singular that this case should not have been cited in *Stanley* v. *Powell*. For loaded fire-arms assuredly are dangerous weapons used at the peril of the user (*Dixon* v. *Bell*, 5 M. & S. 198). If the case was within *Rylands* v. *Fletcher* the verdict of the jury negativing negligence was of course irrelevant, except for the purpose of assessing damages. Doer and sufferer, sportsman and beater, were alike morally innocent, but one had by an immediate act of force in the use of a dangerous weapon injured the other, 'spoiled his eye,' as Mr. Pepys would say, and should, as between the two, bear the consequences of the mischance. It is not likely that one pheasant less would be shot, but a beater or two less might. Even on this view, however, there might be a further question whether the beater had not willingly exposed himself to the risk, not indeed of wild shooting, but of accidents without negligence.

The Bankruptcy Report for 1890 is an instructive commentary on our latest experiment in bankruptcy legislation. The first thing that strikes the reader is that nearly half the insolvent estates, and more than half the total assets, are administered outside the Bankruptcy Act altogether, under deeds of arrangement. The next is the smallness of the dividends. Creditors, in the case of estates wound up by the official receiver, get 1*s.* 4*d.* in the pound; in the case of estates wound up by non-official trustees, 2*s.* in the pound. The difference is not due to official administration being more costly or less efficient than non-official, but to the fact that only the most rotten estates are abandoned to the official receiver. The charges against official administration of 'slaughtering' securities instead of 'nursing' them are effectually refuted by the statistics of the Inspector-General. Such charges come from the sanguineness of debtors who, as the Report shows, value their assets at nearly double their actual value as tested by realisation.

The above dividends, it must be remembered, represent the average. As a matter of fact, estates under £50 pay nothing, the whole assets being swallowed up in costs. If dividend paying were the sole criterion of the Act, it can hardly be called a success. But the Court under it, besides being an administrator of assets, is the guardian of commercial morality, and the figures show the growth of a wholesome severity. Only a percentage of twelve unconditional discharges were granted in 1889 as against a percentage of forty-six in 1884, while there was a percentage of sixty-nine suspensions in 1889 as against a percentage of thirty-three in 1884. This increasing strictness is one of the things, no doubt, which accounts for the popularity of private arrangements. Another is that they pay solicitors better than a bankruptcy petition. Certainly mercantile feeling sets strongly in favour of such arrangements, and, speaking generally, there is no reason to regret it. But such arrangements are open to a twofold abuse. They are used (i) to get rid of creditors cheaply, by forcing an inadequate composition on them without their having the means of knowing the debtor's resources, and (ii) to hush up offences against the bankruptcy law. Of course a creditor need not come in, but he is told (often truly) he will get nothing if he holds aloof, and initiating bankruptcy proceedings is a trouble he is probably not willing to incur even if he has a good petitioning debt. Sir A. Rollit's new Act imposes some salutary checks on arrangements inside the Act; some similar safeguards are wanted for arrangements outside it.

Revised Reports.

The republication of the old reporters who are modern enough to be of frequent practical utility, reduced to a manageable bulk and cost by the omission of obsolete matter, has often been thought and talked of as desirable. It is now likely to be accomplished. Messrs. Sweet and Maxwell (Limited) are about to publish a series of 'Revised Reports' under the general editorship of Sir Frederick Pollock. The series will comprise the common law and equity reports from 1785 (the commencement of the Term Reports) downwards. It is roughly estimated that, after a start is once made, four or five volumes of equivalent average bulk to the Q. B. D. Law Reports may be produced in a year, and that between forty and fifty such volumes may account for the cases down to about 1850. Whether the series shall ultimately be continued till it touches the Law Reports is a question for the future which will depend, among other conditions, on the support given to the scheme by the

profession on both sides of the Atlantic. No commentary will be added, but the head-notes will be revised so far as needful, and the cases or parts of cases reprinted will be furnished with concise references to later decisions in point. It is proposed, as the publication makes way, to issue periodical digests with complete tables of the omitted as well as the included cases. Criminal law, we understand, will be separately dealt with on a similar plan. The 'Revised Reports' will, however, include decisions in criminal jurisdiction which affect the law of property and other matters of importance to practitioners in civil courts. The annual cost to subscribers will probably not much, if at all, exceed the present rate of subscription to the Law Reports or the Law Journal.

We do not usually give or comment on items of professional news, for the obvious reason that such is not the business of a quarterly publication. But the still fresh appointments of a distinguished Cambridge and a distinguished Oxford man to the bench of the Chancery and of the Queen's Bench Division are good warrant for breaking our rule. Mr. Justice Romer and Mr. Justice Wright have our best congratulations for the honour they have done to the two Universities; and the Bar and their clients may also this time be congratulated without reserve. We mean the clients who are lawful men, for we suspect that whenever Mr. Justice Wright gets a chance of judicially expounding the law of theft the criminal classes will not be pleased. But there is no pleasing everybody in this world.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

TRIAL BY JURY IN CIVIL CASES[1].

MR. A. R. JELF, Q.C., in two very able letters to the 'Times' in August last, strongly urged that further restrictions should be put upon the right of the parties to an action to demand a jury in civil cases. The question he raised is one of much difficulty and also of great public importance. His letters gave rise to considerable controversy, and, among others, I ventured to tread upon his coat tails in this legal Donnybrook Fair by a short letter on the subject. I should like this evening to repeat the arguments I then used at somewhat greater length, and to add some further arguments which perhaps can be better appreciated by a purely professional audience than by the general public. I try a good many cases with juries every year, and on the whole the more I see of juries the higher is my respect for the general good sense and justice of their verdicts. When the jury have given their verdict I have sometimes said to myself, 'Well, that is not the verdict I should have given, but on the whole I believe they were right and I should have been wrong.' Of course juries now and again go wildly wrong—at least the judge thinks so. But then it is just possible that the judge may be like the celebrated twelfth juryman, who, when he found the other eleven were unanimous against his view, informed the judge that he had never before met eleven such pig-headed fellows in his life.

The last straw which broke down Mr. Jelf's confidence in the jury system was the fact that during the Summer Circuit he had been engaged in three cases in which the jury disagreed. Perhaps that merely shows that Mr. Jelf is too good an advocate, and that he succeeded in dividing the jury in cases which he ought to have lost. But in many instances a disagreement of the jury is the fitting end of the trial. The evidence on both sides may be utterly unsatisfactory and inconclusive. The disagreement of the jury is then equivalent to the convenient verdict of 'not proven' in Scotch criminal law. When a jury have disagreed, I have often thoroughly agreed with them. The trial of course is abortive, and the case has to be tried again, which means further expense and further loss of time. But on the second trial one side or the other usually produces additional evidence which ought to have been

[1] This was a paper read at the Oxford Law Club on the 8th of November, 1890.

produced at the first trial, and then one scale or the other kicks the beam.

I am aware that 'further evidence' is not always satisfactory. Not long ago I was trying a case which turned on a conversation between the plaintiff and defendant, at which nobody else was present. I told the defendant that his story was extraordinary, and that as it was uncorroborated I could not accept it. He at once replied that if I would give him an adjournment he would bring plenty of witnesses to corroborate him. I need not add that his offer was declined. But law like other sciences requires its postulates, and it is one of the postulates of law that truth can be ascertained by means of sworn testimony. No doubt, as Mr. Jelf says, when a case is tried before a judge alone he must give a decision one way or the other, whatever doubts he may have in his own mind. But is this satisfactory? If a race really ends in a dead heat, is it right that the umpire should be obliged mentally to spin a coin and say that one horse or the other is the winner? A judge usually takes refuge in legal platitudes about the onus of proof, but he cannot always do this. There is a story of a Cardiff jury who were directed by the judge that the only question for them was whether they believed the plaintiff's or the defendant's account of the transaction. To this they replied by saying 'of the two liars we disbelieve the defendant the least.' This finding was gratuitous on the part of the jury, but a judge is sometimes forced to give a judgment to the same effect though in different language. Neither of the parties enjoy it.

This brings me to Mr. Jelf's second ground of preference for trial by judge over trial by jury. A judge is compelled to give his reasons, while a jury ought to give their verdict without stating their reasons. It seems to me this is one of the strong points of the jury system. A judge is always embarrassed by the feeling that his decision more or less creates a precedent. He hankers after consistency. The ghosts of past decisions rise up before his mind, and cases yet to come cast their shadows before them. The jury are haunted by no such spectres. They meet together once for all to do justice to the particular parties in a particular case. When the jury have given their verdict, the temporary corporation is at once dissolved into its constituent atoms. I think it was Lord Westbury who appointed to a colonial judgeship a man who had had but little practice at the Bar. His parting advice to him was, 'Give your decisions boldly, and they will very likely be right, but for God's sake don't give your reasons, for they are sure to be wrong.' Juries very often arrive at very sound decisions by very illogical routes. I was once sitting in a criminal court where

I could hear the deliberations of the jury. A lad of sixteen was being tried for committing a burglary in his father's house. The evidence against him was clear. The jury asked the judge if they could find him guilty of any lesser offence. The judge replied, as he was bound to do, that it was a case of burglary or nothing. I heard a juryman remark, 'Well, his father ought to have given him a good hiding, and not brought him here.' The others agreed, and they at once found a verdict of 'Not guilty.' It would puzzle a judge to come to an equally sensible conclusion by any process of reasoning which would stand the test of an appeal. This was a criminal case, but the moral of the story applies to civil cases also. A few years ago I tried a case between two horse-dealers, in which there was very hard swearing on both sides. The jury pretty promptly found for the plaintiff. Personally I should have given judgment for the defendant as I did not believe either side, but I was not dissatisfied with the verdict, though I was rather curious to know how the jury had so quickly made up their minds on the conflicting evidence. I afterwards heard the reason. One of the jurymen had said to the rest, 'I don't know the plaintiff, but the defendant is a friend of mine, and I know he is a d—d liar.' It is certainly well that the verdicts of juries should be unaccompanied by their reasons.

There are undoubtedly certain classes of cases in which juries are much better than in others. Anyone who is much in courts of justice must acknowledge that where the issue is which party has been guilty of a fraud there is no tribunal like a jury. They seem to scent out a fraud by an unerring instinct. The current legal explanation of the phenomenon is that, however novel a fraud may seem to the unsophisticated lawyers in the case, there is always some one on the jury who has either committed or attempted a similar fraud himself. Personally I have an alternative theory. In doubtful cases I know that one's decision is often determined by some almost impalpable incident. Something in the demeanour of a witness just turns the balance. Sometimes one sees a witness looking for inspiration to the back of the court, or something of that kind. Juries have better opportunities of observation than the judge. They have twelve pair of eyes to his one pair, and while he is engaged in taking down the evidence they can use their eyes and compare notes afterwards. I think between them they generally hammer out the truth. I have heard it observed that juries find many more verdicts for plaintiffs than a judge would do, and the suggested reason is that they listen to the plaintiff's case, but are wearied before the defendant's turn comes, and don't take his case in. You cannot expect untrained

men to keep up their attention for many hours in foul air, and with cramp in both legs. If there were any truth in this suggestion, the remedy would be to provide less abominable courts and better accommodation for the jury. It is an argument for mending, but not for ending the jury system.

There certainly are two classes of cases in which juries start with a bias in favour of the party whom Scotch law calls the 'pursuer.' The first is where the plaintiff is a woman, especially if she be good-looking, and the second is where the defendant is a corporation, especially if it be a railway company. But then I have heard it whispered that even some judges give a very attentive hearing to a pretty plaintiff with a taking voice and manner. The Common Law has a remedy for every wrong, and very likely the best way to abate the 'charming woman' nuisance would be to revive for her benefit that venerable legal institution, the jury of matrons. On the other hand, a pretty woman has, by the bounty of nature, a tremendous start in every other department of life, and I do not know that justice requires that she should be artificially handicapped in legal proceedings.

Again, juries certainly show scant mercy to defendant companies. They fully realise that a corporation has no soul to be saved or body to be kicked, but that it has a pocket to be picked. Sometimes when I think a jury may be going to give too heavy damages I tell them the story of the thief who went to a charity sermon, and was so affected by the preacher's eloquence that he emptied the whole contents of his neighbour's pocket into the plate, and I warn them that we must not follow the example of that thief in a court of justice. But then how many of us owe the safety of our lives and limbs to the high standard of diligence which juries compel the railway companies to observe. I am not sure that the verdicts of juries in accident cases are not an unconscious application of the maxim *salus populi suprema lex*, and it is by no means certain that the railways do not save money in the end by being kept up to the exacting views of British juries in their dealings with passengers and their property. Taking the verdicts of juries as a whole, I think they do a vast amount of illogical justice or righteous injustice which could not be attained by any other machinery.

Then it is said that serving on juries is very irksome to jurymen themselves. No doubt it is. Serious inconvenience is often caused to business men by being suddenly taken away from their work. I think the hardship might be mitigated by better arrangements for summoning juries. But apart from this, I venture to think that individual inconvenience is more than counterbalanced by con-

siderations of public policy. There is a growing but evil tendency in modern English life to delegate all public functions to paid deputies. People are apt to think that all the duties of citizenship can be discharged by the mere payment of taxes. It seems to me most important that this opinion should be checked, and that ordinary citizens should be compelled occasionally to take a responsible part in the administration of justice. It is the best guarantee we can have for the preservation of public confidence in the administration of the law. One of the suggestions made during the recent controversy was that young lawyers waiting for business should serve on juries. I can't imagine a worse suggestion. Law-calf is an excellent thing, but calf-law would be a terrible product. The less law juries know the better. What you want from them is common sense and business knowledge applied to the facts of the case, with a desire to do justice to the particular parties before them. Their function is to bring positive law into line with positive morality. Sometimes I have wandered into a court of equity which knows not juries. One finds oneself in a rarified atmosphere of morality and respectability, in which life is hardly possible. Look at the equitable doctrines of constructive notice and constructive fraud. Look at the impossible standard of duty laid down for trustees. Such a system of law could never have arisen with juries. They would have punished fraudulent or careless trustees, but they would have protected any honest trustee who had acted with average prudence. I am not advocating a low standard of morality in legal matters. Juries are like the rest of us. We always judge others by a higher standard than we should apply to ourselves. But the morality of juries is a sublunary, man-in-the-street sort of morality, which commends itself to ordinary folk, and secures their approbation. It is wholly distinct from the sublimated morality of non-jury tribunals such as the Courts of Equity. The most satisfactory branch of our law is the law merchant, and that law has been entirely fashioned out of the verdicts of juries under the direction of the judges. No better tribunal of commerce could be devised than one of the old Guildhall special juries, with a judge like Lord Bramwell or Lord Esher.

It is true no doubt that trial by jury is more expensive, and takes up more time than trial with a judge alone. Rules of evidence have to be more strictly observed, and the proceedings are necessarily longer. But these initial disadvantages are compensated for by the superior finality of a jury trial. The appellate courts are rightly very loth to disturb the findings of a jury. Unless the verdict is obviously perverse, it finally settles the issues of fact. As regards any questions of law that the case may raise,

they are raised clearly, uncomplicated by doubtful questions of fact.

So far I have only considered the jury system as it directly affects the public, that is, the litigants and the jurymen themselves; but indirectly it affects the public through the medium of the judges. There are many cases which a judge much prefers to have decided by a jury; for instance, the common issue whether a signature to a bill of exchange is or is not a forgery. I quite admit that the judge's personal preferences are irrelevant, but happily public sentiment to a great extent coincides with his preferences. People generally feel that such issues are more satisfactorily settled by a body of men than by a single man. Again, it is a great advantage that the parties should have a choice of tribunals. Individual judges, rightly or wrongly, are often supposed to hold strong views with respect to particular classes of cases. When this is the fact, I suppose the judge in question would describe his view as a reasonable generalisation from past experience, but the party to whom his view was adverse would be apt to describe it as an unreasonable prejudice. It is not necessary to inquire which description is right. But obviously in such cases it is better to call in the aid of a miscellaneous and fortuitous body like the jury. It is important that the parties to a law-suit should get justice, but it must never be forgotten that it is almost equally important that they should think they get justice. Discredited justice is almost as bad as veiled injustice. Further, the knowledge that the parties can have a jury if they like, enables a judge to deal much more freely with the cases in which there is no jury. If a judge has views about particular kinds of cases, it is much better that he should express them frankly. His views would not affect his decisions the less because he did not express them. The jury system reacts upon the judges who work it in other ways. In the first place (I speak for myself) it makes the judge learn some law and keep it accessible for use. In a jury case he has to decide most points of evidence as they arise. He cannot reserve them to look them up at his leisure, and in his summing up he must give the jury a clear and unequivocal direction on any questions of law involved in the case. If he fails to do so, a new trial is the ordinary consequence. Again, there is an old saying that hard cases make bad law. So they do when there is no jury. The judge is anxious to do justice to the particular parties before him. To meet a particular hard case he is tempted to qualify or engraft an exception upon a sound general principle. If the exception is overruled on appeal, the party for whose benefit it was intended is put to extra cost. If

the exception is upheld, doubt is thrown on the generality of the rule, and fresh litigation of doubtful points is inevitable. Again, the subordinate principle laid down in the exception is often found to extend to cases which originally were not contemplated. When a judge once leaves the straight and narrow path of law, and wanders into the wide fields of substantial justice, he is soon irretrievably lost—as witness the decisions of a late lamented Vice-Chancellor. But hard cases tried with a jury do not make bad law, for they make no law at all, as far as the findings of the jury are concerned. The principle is kept intact while the jury do justice in the particular case by not applying it. The issues of law and fact are kept distinct. Look at the Equity reports, where issues of law and fact are not discriminated. They contain the decisions of able judges, and are reported by able lawyers. The utility of the report of a decided case consists solely in the legal principle which it embodies. The facts are of no interest to lawyers except as being the scaffolding which supports the legal principle. Now there never was yet, and I hope there never will be, a proposition of law which could not be expressed in four lines of small print. Yet the head-note of an equity decision in the Law Reports, which ought only to summarise the legal points involved in the case, frequently occupies from a page to a page and a half. The fault does not lie with the reporters, but with the system which inextricably confounds questions of law with questions of fact. Since the abolition of the old Common Law system of pleading, with its definite issues of fact for the jury, and since the partial disuse of juries in the Queen's Bench Division, the Common Law Reports have shown an ominous tendency to follow the Equity lead. Codification, as far as I can see, is the only remedy which can arrest the decay of legal principles, and render law again an exact science, by means of which men may know their rights beforehand, and be able to adjust their conduct accordingly. If codification be not proceeded with I see nothing to prevent the gradual deterioration of the Common Law, until it becomes indistinguishable from that curious conglomeration of technicality tempered by uncertainty which lawyers know by the name of Equity Jurisprudence.

M. D. Chalmers.

THE DEFINITION OF GENERAL AVERAGE[1].

A SHIP on the High Sea occupies an exceptional position, which has given rise to exceptional rules of law, its commanding officer's responsibilities far transcending the ordinary responsibilities of the occupations of his class at home. As sole custodian of ship and cargo for their safe arrival and delivery at their destination, he is relied upon by the owners of both alike. In case of danger, on him alone depends the safety of the adventure in all its component elements, and when his little commonwealth is in jeopardy, he necessarily strains every effort to save what he can, without distinction between the interest of the one or the other owner.

In ordinary cases of danger, safety is not achieved by destruction of any kind, but if damage is done to the property of *A*, exposed to the same risk as that of *B*, it is not to save that of *B*, but that of *A* himself that it is done, and each party in common risk bears his own loss.

On the High Sea the case is different. There are risks in the presence of which the Master of a ship has to choose between abandoning ship and cargo and sacrificing a part of one or other to preserve the rest.

The ship may be sinking, and by the sacrifice of some of its weight it may be possible to keep its deck a certain height above water till assistance comes, or it can be brought into a place of safety; or it may be chased by an enemy and gain speed by being lightened and thus escape capture, or for some other reason lightening the vessel by the sacrifice of a part of its contents may save the whole adventure.

Justice requires that one person should not reap the benefit of another's loss; and, hence, from time immemorial, the custom of the sea has been that, in the case of such a sacrifice, the loss shall be borne by those for whose sake it was made.

'*Aequissimum enim est commune detrimentum fieri eorum, qui propter*

[1] The following paper was read at the Liverpool meeting of the Association for the Reform and Codification of the Law of Nations in connection with the revision of the York-Antwerp Rules.

amissas res aliorum consecuti sunt, ut merces suas salvas haberint,' says Paulus in the Digest [1].

Early Laws.

The same Digest, under the heading of *De Lege rhodia de Jactu*, laid down the rule as follows: '*Lege rhodia cavetur ut si, levandae navis gratia, jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est* [2];' that is to say, that if goods are thrown overboard in order to lighten a ship, the loss, *incurred for the sake of all*, shall be made good by the contribution of all.

This Rule passed into the Sea Laws of the Middle Ages in different forms.

Rules VIII and IX of the Laws of Oleron provide that where the vessel '*ne puisse échapper* sans jetter des danrées et marchandises pour faire aller ladite nef, et *pour sauver le reste et le corps de la nef*,' and 's'il advient que le maître veuille couper son mast par force de fâcheux temps,' the owners of the property saved contribute rateably to the reparation of the loss.

The Laws of Wisbuy contained the following Rule on the subject (Rule 38, as rendered by Cleirac):—'Le maître ne pourra pas faire jet sans en conférer auparavant au marchand, et si le marchand n'y veut pas consentir, et que néanmoins avec deux ou trois de l'équipage, et les plus expérimentez mariniers *il est trouvé nécessaire*, lors il pourra jetter, et seront les dits matelots crus à leur serment, que ce fut *expédient* de jetter. Que s'il n'y a pas de facteur ou de marchand dans le navire, le maître et la plus grand part des matelots demeureront d'accord de ce qu'il faudra faire . . . . . Le maître à contribution du jet payera sa part des marchandises jettées, jusques à concurrence de la valeur du navire, ou de tout le fret au choix du marchand, et le marchand pour la valeur des autres marchandises restantes [3].'

The Guidon de la Mer (Rule 21) laid down the rule with greater precision: 'Mais si *pour la salvation de la nef et marchandises*, en cas de vent impétueux, grande tourmente, que sans fraude et déception il fait besoin couper cordages, masts, abandonner les voiles au gré du vent, faire jet des marchandises, ou des utenciles du navire; ou si estans en rade fâcheuse entre les mains des pillars, l'on fut contraint de faire ce que dessus, la perte sera estimée sur les marchandises restantes, et sur le corps de la nef et apparaus, ou sur le fret à l'option du maître.'

[1] D. 14. 2. de leg. Rhod. 2 pr.

[2] D. 14. 2. de leg. Rhod. 1.

[3] This is Article 36 of MSS. of 1533 and 1537 and 41 of that of 1505: Cleirac's translation is imperfect, but gives the sense of the original words:—'Unn duchte id deme Schippere gud, unn van deme Schipluden twen ofte dren beter gedan wen gelaten, so scal men denne moghen werpen,' &c.

Articles 64 and 65 of the Laws of the Hanse Towns stated that 'If a ship at sea *be in danger*[1], so as the goods must be thrown overboard, those that are cast out shall be answered by the ship and goods preserved as an average,' and that 'if a master be obliged to cut his mast or sails by stormy weather, the merchant is to bear part of the loss[2].'

Modern practice has been evolved out of these different manifestations of the old Rule of the Sea, and chiefly through the medium of the French *Ordonnance de la Marine* of 1681.

The Ordonnance (l. III, tit. VII, art. 2) defines General Average as follows: 'Les *dépenses* extraordinaires faites, et le dommage souffert *pour le bien et salut commun* des marchandises et du vaisseau.'

This Article passed into the French Code of Commerce in the following form: 'Les dommages soufferts volontairement et les dépenses faites d'après délibérations motivées, pour le bien et salut commun du navire et des marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement' (Art. 400), and thence into the Codes of the many European States which copied those of France.

Rise of Modern Questions.

The Rules of General Average at the present day are not, however, confined as in the Middle Ages to the general principle. The principle was extended, as we have seen, in the definition given in the Ordonnance of 1681, from the simple case of jettison to that of all 'extraordinary expenses and damage suffered.' These expenses, with the rise of steam navigation and large general ships, have assumed a variety not dreamt of in the Laws of Oleron and Wisbuy, and amid such variety there are necessarily doubtful cases in which it is not absolutely certain whether general contribution is warranted or the expense should be borne by the party who has suffered it. Rules, moreover, have sprung up, under pressure of expediency, which do not appear to quite fall under principles governing General Average, and to accommodate this overstretching of the principles to the general rules, the old principles themselves have been put in jeopardy. The result is that at the present day there is hardly any branch of maritime law which is the subject of more uncertainty than this one of General Average.

To place the Rules on this subject on a uniform footing was the object of the international meetings at York in 1864, and at Antwerp in 1877, where a certain number of competent gentlemen drew up the 12 Rules known as the York-Antwerp Rules.

[1] The original text runs: 'Ist ein Schiff in Wassers Noth; also das men Güter ausswerffen muss,' &c. See Title VIII of the Ordinance of 1614 given in Pardessus.

[2] Translation in Alexander Justice's Dominion and Laws of the Sea, 1705, p. 255.

These Rules were confined to the classification of particular circumstances. No declaration of principle appeared among them, and circumstances and their combinations being infinite, of course they are and will always as such remain incomplete.

Since 1877 no meeting on the subject, in which any noteworthy representation of British opinion has been effected, has been held, but two important Continental Congresses have dealt with it with all the weight of a strong international representation of Continental opinion, and the principles on which an international understanding may be effected, in them received the most authoritative Continental expression thus far obtained.

Resolutions of the Royal Belgian Congresses.

These were the Commercial Law Congresses held under the patronage of King Leopold in 1885 at Antwerp, and in 1888 at Brussels.

That of 1885 confined itself to the enunciation of principles declaring that 'uniformity of maritime law could only be established and maintained, if these laws confined themselves to defining general average, leaving it to the parties to enumerate the principal cases' (Art. 31).

This restriction was thought by a large number of members to be a mistake, and at Brussels an enumeration of cases was adopted.

The project thus drawn up was as follows:—

'Art. 1.—Les avaries communes sont les dépenses extraordinaires et les sacrifices faits volontairement par le capitaine ou d'après ses ordres, pour le bien et salut commun du navire et du chargement.

'Art. 2.—Sont notamment considérés comme avaries communes:

'(*a*) Les dommages résultant du sacrifice de marchandises, mâts, *machines*, agrès ou apparaux, *et en général de tout objet faisant partie du navire ou de la cargaison*[1]; ces dommages comprennent, non seulement la valeur des choses sacrifiées, mais encore toutes les détériorations éprouvées par le navire ou le chargement et qui sont la conséquence directe et immédiate du sacrifice de ces choses.

'Sont compris dans ces dommages ceux occasionnés aux choses employées à un usage auquel elles n'étaient pas destinées; il en est autrement des conséquences préjudiciables résultant d'un usage excessif, mais conforme à la destination des choses, tel qu'un forcement de voiles ou un forcement de vapeur;

'(*b*) Les dommages causés par l'échouement volontaire, effectué en vue d'éviter la perte totale ou la prise du navire et du chargement, *y compris ceux qui résultent*[1] de la remise à flot du navire échoué et les frais de celle-ci;

[1] The parts in italics indicate the changes made at Brussels upon the preliminary project.

'(*c*) Les dommages causés au navire et aux marchandises non atteintes par le feu, à l'effet d'éteindre un incendie survenu à bord ;

'(*d*) Les dommages causés au navire ou à la cargaison pour empêcher le navire de sombrer ;

'(*e*) Les sacrifices faits dans le but d'éviter un abordage ;

'(*f*) *Les frais d'allègement et de transbordement extraordinaires, et en cas d'échouement et de relâche forcée, les frais de déchargement, emmagasinage et rechargement de la cargaison, et les dommages qui sont la conséquence directe et immédiate de l'un de ces faits ;*

'(*g*) Les autres frais de relâche forcée relatifs au navire, y compris les loyers et la nourriture de l'équipage pendant la relâche. Les frais de relâche n'entrent en ligne de compte qu'aussi longtemps que dure la cause qui a amené la relâche ;

'(*h*) Les frais de séjour *extraordinaires* dans un port d'escale que l'approche de l'ennemi ou des pirates empêche de quitter ;

'(*i*) Les dommages et les frais occasionnés par la défense du navire et de la cargaison contre l'ennemi ou les pirates sont compris dans ces frais et dommages, les frais de maladie, frais funéraires et indemnités à payer au cas où des personnes de l'équipage ont été blessées ou tuées en défendant le navire ;

'(*j*) L'indemnité d'assistance ;

'(*k*) Les frais résultant des levées d'argent faites en cours de voyage pour payer les avaries communes, *ainsi que les frais de liquidation des avaries communes.* Sont compris dans ces frais : les pertes sur marchandises vendues en cours de voyage, le profit maritime de l'emprunt à la grosse, la prime d'assurance des sommes employées, ainsi que les frais de l'expertise nécessaire pour dresser le compte des avaries communes.

'Art. 3.—Les marchandises chargées sur le pont, *excepté dans le cas où la loi permet ce mode de chargement*, les marchandises sans connaissement *et qui ne sont portées ni dans le manifeste, ni dans le registre de chargement*, les agrès ou apparaux non inventoriés ne sont pas admis en avaries communes.

'Art. 4.—Il y a lieu de répartir l'avarie commune par contribution dès que le navire ou la cargaison est sauvé, en tout ou en partie.

'*Il importe peu que le salut, au lieu de procéder directement du sacrifice, se produise par suite de circonstances indépendantes.*

'Art. 5.—La masse *qui doit contribuer* se compose :

'(*a*) De la valeur nette intégrale qu'auraient eue, au moment et au lieu de déchargement, les choses sacrifiées, *y compris le fret payé d'avance ;*

'(*b*) De la valeur nette intégrale qu'ont, aux mêmes lieu et moment, les choses sauvées, *même celles spécifiées à l'art. 3 ci-dessus*, y compris le fret payé d'avance, ainsi que le montant du dommage qui leur a été causé pour le salut commun ;

'(*c*) Du fret et du prix du passage, s'ils sont encore dus ; les frais *qui eussent été épargnés* si le navire et la cargaison s'étaient perdus totalement au moment où l'avarie commune s'est produite, seront déduits du fret et du prix du passage.

'Les effets des gens de mer, les bagages des passagers, les munitions de guerre et les provisions de bouche dans la mesure nécessaire au voyage, bien que remboursés par contribution, ne font pas partie de la masse qui doit contribuer.

'ART. 6.—*La masse à indemniser par contribution se compose :*

'(*a*) *De la valeur nette intégrale qu'auraient eue, au moment et au lieu du déchargement, les choses sacrifiées sans déduction du fret. Lorsqu'il s'agit du navire, la valeur est fixée par le coût des réparations, sous déduction, s'il y a lieu, de la différence du vieux au neuf et du prix de vente des vieilles pièces remplacées.*

'(*b*) *De la différence entre la valeur nette intégrale qu'ont, aux mêmes lieu et moment, les choses endommagées et celle qu'elles auraient eue si elles n'avaient pas été endommagées.*

'(*c*) *Des dépenses extraordinaires faites conformément à l'art.* 1^er^.

'ART. 7.—Les règles à l'avarie commune doivent s'appliquer, même lorsque le danger, cause directe du sacrifice ou de la dépense, a été amené, soit par la faute du capitaine, de l'équipage ou d'une personne intéressée au chargement, soit par le vice propre du navire ou de la marchandise.

'Le recours que donne la faute ou le vice propre est indépendant du règlement de l'avarie commune.

'ART. 8.—Toutes les avaries communes successives se règlent simultanément, à la fin du voyage, comme si elles ne formaient qu'une seule et même avarie.

'Il n'en est autrement que lorsqu'une marchandise est embarquée ou débarquée en un port d'échelle et pour cette marchandise seulement.

'ART. 9.—Le règlement d'avarie s'opère au port de reste.'

Thus :—

'1.—General Average is the extraordinary expenses and the sacrifices made intentionally by the master, or by his orders, for the common weal and salvation of the ship and cargo.' (Art. 1.)

2.—'There is General Average which must be adjusted by contribution whenever the ship and cargo have been saved in whole or in part. Nor is it of import whether the safety, instead of proceeding directly from the sacrifice, is the result of independent circumstances.' (Art. 4.)

'3.—The rules relating to General Average apply even when the danger which has been the direct cause of the sacrifice or expense has been due either to the fault of the captain, of the crew or of a person interested in the cargo, or to a defect in the ship or the cargo.'

'The recourse arising out of such a fault or defect is independent of the adjustment of General Average.' (Art. 7.)

These three rules define the nature of General Average as determined at Brussels.

Foreign Laws on General Average.

To understand the bearing of these resolutions, it is necessary to examine the provisions of the prevailing laws of the countries of those who adopted them. Omitting matters of detail the principles laid down by these laws [1] are as follows:—

French Code.

The French Code of Commerce provides:—

'Art. 400.—Et, en général, les dommages soufferts volontairement et les dépenses faites d'après délibérations motivées *pour le bien et le salut commun* du navire et des marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement.

'Art. 403.—Sont avaries particulières:

'1. Le dommage arrivé aux marchandises par leur *vice propre*, par tempête, prise, naufrage ou échouement . . . . . .

'Art. 405.—Les dommages arrivés aux marchandises, faute par le capitaine d'avoir bien fermé les écoutilles, amarré le navire, fourni de bons guindages et par tous autres accidents provenant de la *négligence du capitaine ou de l'équipage* sont également des avaries particulières supportées par le propriétaire des marchandises, mais pour lesquelles il a son recours contre le capitaine, le navire et le fret.

'Art. 423.—*Si le jet ne sauve le navire*, il n'y a lieu à aucune contribution.

'Les marchandises sauvées ne sont point tenues au paiement ni au dédommagement de celles qui ont été jetées ou endommagées.'

'Art. 425. . . . . Les marchandises ne contribuent point au paiement du navire perdu, ou réduit à l'état d'innavigabilité.'

M. de Courcy sums up these articles in three conditions, essential by French law, to give rise to General Average. They are:

'1.—Acte de volonté qui détermine un sacrifice ou une dépense;

'2.—Intérêt commun du navire et de la cargaison;

'3.—Résultat utile obtenu [2].'

M. Cauvet [3] and M. Frignet [4] find four—viz.:

'1.—Volonté qui détermine un fait, cause du dommage ou de la dépense.

'2.—Danger de perte imminent;

'3.—Danger commun au navire et à la cargaison;

'4.—Résultat utile obtenu, résultat qui doit être le salut du navire et de la cargaison.'

M. Desjardins [5] understands the articles thus:

[1] I have taken the French translations of the articles of the different Codes quoted from an excellent table prepared for the use of the Brussels Congress by M. Ouwerx, who in turn acknowledges his indebtedness to the work of Mr. Ulrich, the well-known German authority on this subject.

[2] Questions, I, p. 225; II, p. 256; III, p. 184.

[3] Traité des Assurances, No. 340.

[4] Traité des Avaries, No. 320.

[5] Droit Commercial Maritime, No. 976.

'1.—Il y a lieu de pourvoir à la sécurité commun du navire et de la cargaison ;

'2.—Le résultat doit profiter à l'intérêt commun.'

M. Weil[1] and M. Droz[2] take the same view as M. de Courcy.

It is seen that there is a difference of construction, especially as regards the necessity of the peril being imminent.

Belgian Code.

The Belgian Code of Commerce lays down the distinction in the following terms:—

'ART. 102.—Sont *avaries communes:* les dépenses extraordinaires faites et les dommages soufferts volontairement pour *le bien et salut commun* du navire et des marchandises. Toutes autres sont *particulières.*

'ART. 103.—Sont toutefois *considérées comme avaries communes* les dépenses de toute relâche *effectuée à la suite de fortune de mer qui mettrait le navire et la cargaison, si la navigation était continuée, en état de péril commun.*

'Si la relâche est motivée par des avaries qui soient reconnues provenir du *vice propre du navire, ou d'une cause imputable au capitaine ou à l'équipage,* les dépenses sont avaries particulières au navire. Si la relâche est motivée par la fermentation spontanée ou par d'autres *vices propres de la marchandise, toutes les dépenses sont avaries particulières à la marchandise.*'

M. Jacobs, who presided over the Maritime section of the Royal Belgian Congress above referred to, explains in an able pamphlet, written in anticipation of that of 1885, that by Belgian law 'l'intérêt commun doit naître d'un danger, sans qu'il faille cependant que ce danger revête le caractère d'un péril imminent[3].'

'Le navire,' he continues, 'bien que fatigué par la mer, pourrait atteindre son port de destination, mais pendant cette longue navigation, les avaries éprouvées par le bâtiment et sa cargaison s'aggraveraient notablement ; le capitaine juge utile, dans l'intérêt commun, d'entrer dans un port de relâche pour reparer le navire et séparer la marchandise avariée de la marchandise saine ; cette relâche est une avarie commune, bien que le salut du navire et de la cargaison, dans le sens étroit de ce mot, n'en dépende pas.'

This is a very good statement of the 'greater peril' theory of which we shall hear more hereafter.

Dutch Code.

This theory seems also to be that of the Dutch Commercial Code, the articles of which on the principles of General Average are as follows:—

[1] Des Assurances Maritimes et des Avaries, No. 282.
[2] Des Assurances, No. 370.
[3] Brussels, Appeal, July 4, 1860.

All extraordinary expenses incurred for the *good* of the ship and the goods together or separate, all damage coming to the ship or goods, during the time fixed in the third section of the ninth chapter for the beginning and ending of the risk, are considered as average.

'ART. 700.—If *inward defects* of the ship, her unfitness for the performance of the voyage, or fault or neglect of the master or crew, have caused the damage or expenses, these latter are not general average, although willingly incurred for the good of ship and cargo after requisite deliberation.

'ART. 707.—Damage come to the merchandise in consequence of the master having neglected to close the hatches, to make the ship properly fast or to provide proper implements for hoisting, and of all other misfortunes, *caused by design or carelessness of the master or crew*, are particular averages, for which the shipper has his recourse on the master, the ship and the freight [1].'

Italian Code.

The Italian Code of Commerce provides:—

'ART. 643.—Sont *avaries communes*: les dépenses extraordinaires faites et les dommages causés volontairement pour *le bien et le salut commun* du navire et des marchandises. Tels sont: . . . .

. . . . . .

'15.—Les dommages soufferts par le navire ou par la cargaison en cas d'échouement volontaire, pour sauver le navire de la tempête, de la prise ou d'un autre péril imminent.

. . . . . .

'Ne sont pas censés avaries communes, même si on les subit volontairement *pour le bien et le salut commun*, les dommages soufferts par le navire ou les frais faits pour lui, s'ils proviennent de *vice ou de vetusté du navire*, ou bien d'une *faute ou de la négligence du capitaine ou de l'équipage*.

'ART. 646.—Les dommages arrivés aux marchandises par des accidents qui proviennent de la *négligence du capitaine ou de l'équipage* sont avaries particulières à charge du propriétaire de ces marchandises, sauf recours contre le capitaine ou sur le navire et sur le fret.'

This Code, it is observed, mentions imminent peril, but only in connection with the case of voluntary stranding. There is no such restriction in the Chilian Code.

Chilian Code.

This Code deals with the subject as follows:—

'ART. 1809.—Sont *avaries communes*, seulement les dommages causés en vertu de délibérations motivées avant ou après le commencement du voyage au navire et à la cargaison conjointement ou séparément, *pour les sauver d'un danger imminent*, mais aussi les

[1] This text is from the official translation published by the Dutch authorities.

dommages qui sont la suite directe et inévitable de ces mesures, ainsi que les dépenses imprévues faites pour le bien commun pendant le temps et dans la forme indiqués.

'ART. 1124.—Sont *avaries particulières*, tous les dommages que souffre le navire ou la cargaison, depuis son chargement jusqu'à son déchargement, par suite d'un accident de mer, de force majeure, *de vice propre de la chose, du fait de l'armateur, du capitaine, de l'équipage*, des passagers ou de toute autre personne, ainsi que les dépenses faites dans l'intérêt exclusif du navire, ou de la cargaison ou d'une partie de celle-ci.'

Spanish Code.

According to the Spanish Code of Commerce of 1885:—

'ART. 811.—Sont *avaries grosses ou communes* en règle générale, tous les dommages causés et les dépenses faites volontairement pour *sauver le navire, sa cargaison ou les deux choses à la fois d'un danger reconnu et réel*; spécialement les cas suivants: . . . .

'ART. 809.—Seront *avaries simples ou particulières*, tous les frais et dommages occasionnés au navire et à sa cargaison et qui n'auront pas été faits dans l'intérêt et l'utilité communs de tous les intéressés au navire et à la cargaison, spécialement les suivants: . . .

'8.—Le dommage subi par le navire ou par la cargaison, par suite de collision ou abordage avec un autre navire lorsque ces événements sont fortuits et inévitables.

'Si l'accident est survenu par la *faute ou la négligence du capitaine*, celui-ci sera responsable de tout le dommage causé.

'9.—Le dommage qu'éprouve la cargaison par *la faute, négligence ou baraterie du patron ou de l'équipage*, sans préjudice au recours du propriétaire contre le capitaine, le navire et le fret.'

Brazilian Code.

The Brazilian Code says:—

'ART. 764.—Et en général les dommages qui, en cas de danger ou d'accident imprévu, sont causés volontairement, et subis comme conséquence immédiate de ces événements, ainsi que les dépenses faites, en ces circonstances, depuis le chargement et le départ jusqu'au retour et au déchargement, d'après décisions motivées *pour le salut et le bien commun* du navire et de la cargaison.

'ART. 765.—Ne sont point considérées comme avaries grosses même lorsqu'elles sont faites volontairement, après délibérations motivées, dans l'intérêt du navire et de la cargaison, les dépenses occasionnées *par le vice propre du navire ou par la faute ou la négligence du capitaine ou de l'équipage.*

'Tous ces frais sont à la charge du capitaine ou du navire.'

Argentine Code.

The articles of the Argentine Code on the subject state:—

'ART. 1476.—Sont *avaries grosses* en général tous les dommages

causés volontairement *en cas de danger* et ceux soufferts comme conséquence immédiate de ces mesures, ainsi que les frais faits en ces circonstances depuis le chargement et le départ jusqu'au retour et au déchargement, d'après délibération motivée *pour le salut commun des* personnes ou du navire et de la cargaison, conjointement ou séparément.

'Sans préjudice à l'application de cette règle générale à tous les cas qui peuvent se présenter, sont spécialement considérés comme avaries communes. . . . . .

'ART. 1478.—Les frais provenant du *vice propre* du navire, de son innavigabilité, ou de la *faute ou de la négligence du capitaine ou de l'équipage* ne seront pas réputés avaries grosses, quand même ils seraient faits volontairement après délibération motivée dans l'intérêt du navire et de la cargaison. Tous ces frais sont à la charge exclusive du capitaine ou du navire.

'ART. 1479.—Sont *avaries particulières*, en général, tous frais et tous dommages qui n'ont pas été faits pour le bien commun et qui sont soufferts par le navire et la cargaison pendant le temps des risques. Sont notamment considérés comme *avaries particulières*. . . . .

'6.—Tout dommage qu'éprouve la cargaison par suite de *négligence, faute ou baraterie du capitaine ou de l'équipage* sans préjudice au recours du propriétaire contre le capitaine, le navire et le fret.'

German Code.

The German Code of Commerce[1], which represents the leading tendencies of Northern Europe, provides as follows:—

'ART. 702.—All damage intentionally done to ship or cargo, or both, by the master or by his orders, for the purpose of *saving both from a common danger*, together with any further damage occasioned by such measures and likewise expenses incurred for the same purpose, are General Average.

'General Average is borne by ship, freight, and cargo in common.

'ART. 703.—All losses and expenses not belonging to General Average but caused by an accident are Particular Average, as far as they do not come under Art. 622[2].

'Particular Average is borne by the owners of the ship and cargo respectively, each for himself alone.

'ART. 704.—The application of the rule for General Average *is not debarred by the fact that the danger has been occasioned by the fault of a third party, or even of one of the parties interested in the adventure.*

[1] The translation in the text is based on that given by our friend Dr. E. E. Wendt, in his valuable Papers on Maritime Law.

[2] 'Art. 622.—Primage, gratuities, &c., cannot be demanded in addition to the freight, unless they have previously been agreed upon. The ordinary and extraordinary expenses of navigation, as—Pilotage, harbour dues, light dues, towage, quarantine expenses, charges for cutting passages through the ice, &c., are to be borne by the shipowner alone, unless an agreement to the contrary was effected; even if the contract of affreightment should not specially bind him to perform the acts causing the expenditure. Cases of General Average, as well as cases where expenses are incurred for the preservation, saving, or rescuing of the cargo, are not included in this article.'

'*The party interested who is in fault can, however, not only make no demand for compensation* on account of any damage which is thereby sustained, *but is likewise answerable to each contributor for the loss which he suffered through such damage being apportioned as General Average.*

'Should the damage have arisen through the fault of one of the crew, the owner is likewise answerable for the consequences, subject to the conditions of Arts. 451 and 452 [1].

'ART. 705.—*Average contribution takes place only when the ship as well as the cargo, each either wholly or in part, have been effectively* (*wirklich*) *saved.*

'ART. 706.—The obligation to contribute on the part of an object (ein Gegenstand) which has been saved is only completely annulled when that object, owing to its having subsequently suffered Particular Average, is entirely destroyed.

'ART. 707.—The right to compensation for damage belonging to General Average is only so far set aside by a Particular Average subsequently affecting the damaged object (whether this be again damaged or totally destroyed) as it is proved that the latter accident not only was entirely independent of the former, but would have likewise carried with it the former damage, if this had not already taken place.

'If, however, before the occurrence of the latter accident, steps should already have been taken to reinstate the damaged article, then the claim for reimbursement holds good as far as such steps are concerned.'

Norwegian Law.

The following article figures in the Norwegian law of March 24th, 1860:—

'69.—Suivant les règles dont le détail est donné par ce chapitre, on considère comme avaries communes les pertes et dommages causés par les sacrifices faits dans le but de *sauver le navire et la cargaison d'accidents plus graves.* Tous les dommages éprouvés par suite d'un pareil sacrifice sont payés comme avaries communes, savoir . . . . . .'

[1] 'Art. 451.—The owner is answerable for any damage occasioned to a third party of the fault of any of the crew in the performance of their duties.

'Art. 452.—The owner is, however, not personally liable for the claim of a third party, but is only answerable to the extent of ship and freight.

'(*a*) When the claim is made on account of a legal transaction, concluded by the master as such, in virtue of the authority he legally possesses, and not in consequence of any especial power of attorney.

'(*b*) When the claim is occasioned by the non-performance, or the incomplete or improper performance, of any arrangement made by the owner, as far as the carrying out of such arrangement belonged to the legitimate duties of the master, no matter whether the non-performance or the incomplete or improper performance was caused through the fault of anybody belonging to the crew or not.

'(*c*) When the claim has arisen through the fault of one of the crew.

'(*d*) This article does not, however, apply to the cases stated under Nos. 1 and 2, if any neglect in the performance or arrangement is attributed to the fault of the owner himself or if he has especially guaranteed the fulfilment of the arrangement.'

Scandinavian Project.

The provisions of the joint-proposed Maritime Code for Norway, Sweden, and Denmark, which may be considered to express the views of the Scandinavian shipping community, however, are as follow:—

'188.—Sont réputés avaries communes, tout dommage qui a été causé volontairement au navire ou à la cargaison, dans le but de les *sauver d'un danger qui les menaçait tous les deux, ainsi que tous les autres sacrifices qui aient été faits dans le même but et les dommages et frais que de telles mesures aient entraînés ou qui en ont été une conséquence immédiate*. Les avaries communes sont supportées par le navire, le fret et la cargaison en commun.

'192.—*La répartition des dommages comme avaries communes aura lieu, quoique le danger qui a rendu le sacrifice indispensable puisse être imputé à quelqu'un: mais le coupable ne peut pas demander une indemnité pour les dommages qu'il souffre lui-même par suite des avaries.* Si le danger est imputable au capitaine ou à quelqu'un dont, aux termes du § 10, il doit répondre, le propriétaire du navire n'a pas droit à une indemnité pour les dommages qu'il souffre.

'*Si le capitaine* ou quelqu'un qui en vertu de sa position à bord, a agi pour le capitaine, *s'est trompé en appréciant la nature du danger* ou en choisissant les moyens pour écarter le danger, *la répartition des dommages comme avaries communes n'est pas exclue*; mais le propriétaire ne peut pas exiger une indemnité pour les dommages qu'il a soufferts, à moins qu'à raison des circonstances, la faute commise puisse être considérée comme excusable.

'Celui qui perd ainsi le droit à une indemnité ou qui a dû contribuer aux avaries communes, par suite de la faute d'un autre, peut exiger une indemnité de la part de celui à qui la responsabilité incombe.

'193.—*Il y a lieu à répartition de dommages comme avaries communes, quoique le but qu'on s'est proposé en faisant le sacrifice ne soit pas atteint par celui-ci.*

'194.—*Il y a lieu à répartition de dommages comme avaries communes quoique le navire, ou la cargaison ait été complètement sacrifié, ou qu'après le sinistre seulement le navire ou seulement la cargaison, en totalité ou en partie, ait été sauvé*[1].'

It has been observed that, though in general deriving inspiration from the German Code, this project discards the provision of Art. 705 of that Code.

Rules of the Copenhagen Marine Association.

The Rules of the Marine Association Company, Copenhagen, sanctioned by Royal decision April 2, 1850, also are interesting as confirmation of the Northern tendency. They provide:—

'217.—Sont considérés comme *avaries grosses ou communes*, tous dommages et autres sacrifices faits volontairement *pour échapper à*

[1] Translation of MM. Christophersen, Van Zuylen, and Dumercy, Brussels, 1888.

un danger qui menace à la fois le navire et la cargaison, ainsi que les dommages, pertes et frais qui y sont relatifs ou qui sont une conséquence immédiate des mesures prises pour échapper au danger.

'Ce principe s'applique conformément aux règles spéciales ci-après.

'224. Si, d'après les circonstances, il peut être admis que *le capitaine croyait, mais à tort, à l'existence d'un danger*, qui rendait nécessaire le sacrifice pour le navire et pour la cargaison, et *si cette erreur constitue une faute* dans son chef, ou si, alors qu'un danger existe réellement, *il a, par sa faute, augmenté le dommage, l'armateur est déchu du droit d'exiger contribution pour les dommages qui en résultent.*'

English Law.

As regards England:—

'General Average,' says Arnould on Marine Insurance (5th edn., by Maclachlan, p. 812), 'is an indefinite phrase used in practical life to denote three things which are very distinguishable each from the other, viz.:—the act of making the sacrifice, the loss sustained as the direct consequence of that act, and the contribution levied on the adventure to recoup the loser.'

'When the danger,' he continues further on, 'is of a total loss of the common adventure, so imminent and conclusive as in the view of a judicious and skilled mariner to admit of but one alternative, and that the alternative of a sacrifice, say of part of the whole, the making of such sacrifice is justified, in fact becomes a duty of the master as agent for all, and is a General Average act in law. If this be a correct description of what constitutes in law a General Average act, then it appears to consist of *an intentional act* on the part of man, *out of the course of the master's ordinary duty* as agent of the shipowner, done on account of the common adventure, *to avert a total loss of the whole, under circumstances in which it is the only alternative.*' (Page 814.)

'The occasion of the act, and the intention with which it is done being such as we have mentioned, *it is not necessary that success should appear or be proved to have followed it* as effect on cause, in order to its being allowed as a general average act,' says Arnould elsewhere. 'There was a different opinion prevalent at one time on this point,' adds the learned editor, Mr. Maclachlan, of the 5th edition. 'The practice, however, is now entirely the other way, and seems in this respect to be justified by what is probably the better opinion. *For who can determine that safety when it does follow was procured by the means which were used?* Or who could tell what instantaneous change in the conditions of the problem at the moment of jettison, may have baffled the soundest judgment formed the moment before? And if the master be justified, that is, be not liable to an action for wrong in throwing the goods of *A* overboard,

is *A*, notwithstanding he was required for the general good to submit to a jettison, to go unrecouped till he has proved to the satisfaction of others that the safety of the adventure was not independent of his loss? In a word, there is an impracticability in the way of making success a condition, that seems a sufficient reason in law why it should not be exacted [1].

One of the most recent definitions of English Law is that of the 1890 edition of Smith's Mercantile Law (by Mr. Macdonell). 'Whenever,' says the author of this careful work, 'damage or loss is incurred by any particular part of the ship or cargo, for the preservation of the rest [2], it is called General Average, that is, the several persons interested in the ship, freight, and cargo shall contribute their respective proportions to indemnify the owner of the particular part against the damage which has been incurred for the good of all [3].

'*But the damage must be for the general good, or to avert a common danger* [4]; and consequently, in order that there may be a general average, *the whole adventure, that is ship and cargo, must have been in jeopardy. The peril, too, must have been imminent.* The general average loss need not, however, consist in the actual loss or injury of the subject in respect of which average is claimed; it may be any expense incurred with relation to it for the common good.'

The doctrine laid down in *Svensden* v. *Wallace* that the General Average act as such ceases with *common safety*, irrespective of beneficial consequences of the act, is contrary to all modern theory and practice, and it is difficult to find any justification for it on grounds either of equity or expediency. The points involved were set out in an interesting paper read by Dr. E. E. Wendt at Hamburg, and reproduced in his Papers on Maritime Law.

Essential Points of Difference.

The perusal of the above provisions will show that a homogeneous definition of General Average involves the following chief points:—

1. The intentional nature of the General Average act.
2. An act not belonging to the master's ordinary duties.

[1] Arnould, fifth edition, p. 21.

[2] The definition in the text is a curtailed statement of the definition of General Average given by Lawrence J. in *Birkley* v. *Presgrave*, 1 East, 220, which was as follows:—'All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, come within General Average.'

[3] *Da Costa* v. *Newnam*, 2 T. R. 407; *Williams* v. *London Assurance Co.*, 1 M. & S. 318; *Price* v. *Noble*, 4 Taunt. 123; *Oppenheim* v. *Fry*, 3 B. & S. 873; 5 B. & S. 348.

[4] *Job* v. *Langton*, 6 E. & B. 779; *Svensden* v. *Wallace*, 13 Q. B. D. p. 84.

3. An imminent peril.

4. The jeopardy of the whole adventure.

5. A successful result.

6. The absence of any latent defect in the ship or cargo.

7. The absence of any fault or imprudence on the part of the person who has suffered the loss.

8. A deliberation with the crew.

These conditions, I believe, cover all the main provisions of different existing laws on the nature of General Average.

1. The only one upon which harmony exists is the first.

2. As regards condition No. 2, this generally figures in English definitions, but it is difficult to recommend it or even to explain what it means, more than that General Average itself is an exception to ordinary rules. It is not found among the definitions and rules of any other laws on the subject, and looks as if it had been invented by the text-book writers to account for the exclusion of damage from carrying press of sail from cases of General Average. As it does not enter into the character, historical or equitable, of General Average, it will probably not be thought needful to insist upon it as an essential principle.

3. That there must be an imminent peril is not self-evident. The Norwegian Code (*see above*) speaks of loss and damage caused by sacrifices made for the purpose of saving the ship and cargo from still graver accidents, but the proposed bill modifies this to saying from a danger threatening ship and cargo, thus following the German Code.

The French Code, we have seen, uses the term 'Bien et salut,' which M. de Courcy interprets as meaning 'Common benefit,' and the prevailing construction of the French courts—though there have been decisions with three possible tendencies—is rather to favour that which implies the proposition of *a common saving and common benefit*, with sufficiently perilous circumstances to determine recourse to exceptional measures[1]. This tendency, which seems likely to become a departure from the 'imminent peril' theory, brings French practice nearer to the German rule. We have seen that the Belgian construction appears to be emphatically against the 'imminent peril' theory.

Among the laws above quoted, only the Chilian Code specifically requires that the peril shall be imminent. The Dutch Code is satisfied with the *good* of the ship and goods, and the Spanish Code requires the existence of an *acknowledged and real* danger.

The codes which derived inspiration from the French codes have

[1] Cass. 15 April, 1863; Caen, 13 Feb., 1861; Nantes, 30 Nov., 1870; Marseilles, 13 July, 1871; Havre, 9 Jan., 1877.

mostly retained the words *le bien et salut commun*, and these words also figure in the Brussels international project. That adopted at Antwerp in 1885 referred to *securité commune*, but the Belgian committee submitted the alteration without comment in 1888, and it was adopted without remark.

English practice seems to require *imminence* of the peril [1].

It will be observed, in referring back to the above quoted passages of the old maritime laws, that in them too there is a difference in respect of the nature of the peril.

The Rhodian law requires a loss incurred *for the sake of all*. The Rules of Oleron, that the sacrifice shall be for the purpose of saving *le reste et le corps de la nef*, the Guidon de la Mer, that of *salvation de la nef et marchandise;* whereas the Laws of Wisbuy speak of *expediency*, and those of the Hanse Towns of *danger* simply like the modern German law and others.

4. The jeopardy of the whole adventure (danger of total loss) is closely connected with the question of imminent peril. It seems to be based on the words 'ne puissent échapper' in the Rules of Oleron. According to Arnould's Marine Insurance, the act must be done 'to avert a total loss of the whole under circumstances in which it is the only alternative.' We have seen the Norwegian Code speaks of acts as giving rise to average contribution which only avert graver perils. No Code seems to specify danger of total loss as a requisite, and it is difficult to see how it can be decided whether the risk was such as to involve all the ship and cargo or only nine-tenths of both, yet the total loss condition makes the nature of the loss dependent on this circumstance.

5. ART. 423 of the French Code of Commerce provides that 'where the jettison does not save the ship, no contribution is allowed. The goods saved are not liable for the payment or indemnification of those which have been thrown overboard or damaged.'

This article has been severely handled by M. Frémery in his Etudes de Droit Commercial [2], who attributes the corresponding article of the Ordonnance of 1681 to a false construction of the words: *salva nave, si navis salva sit* [3]. According to Frémery, these words only mean: 'if the ship has not perished,' that is to say that

[1] Brett L.J. in *Whitecross Wire Co.* v. *Savill* (8 Q. B. D., at p. 662) said: 'If there is an imminent danger, and if the captain sacrifices part in order to save the rest of the adventure, a claim for a general average contribution arises.' See also the *dicta* in *Svensden* v. *Wallace* (13 Q. B. D. 69, p. 72). See also as to the general principle, *Wilson* v. *Bank of Victoria*, L. R. 2 Q. B. 203; *Harrison* v. *Bank of Australia*, L. R. 7 Ex. 39; *Stewart* v. *West Indian and Pacific Steamship Co.*, L. R. 8 Q. B. 88, 362; *Uchard* v. *King*, 31 L. T. (N. S.) 647; *Strang* v. *Scott*, 14 App. Cas. 601.

[2] Paris, 1833. p. 228.

[3] D. 14. 2. de leg. Rhod. 2, § 2; 4 pr.; 5; Paul. Sent. 7. 2. §§ 3 and 4.

otherwise all would have gone to the bottom, and the unity of the disaster would have left no case for average contribution.

M. Desjardins, in his remarkable Treatise on Maritime Law, defends the French theory. 'A good intention,' he says, 'does not suffice to base an action for contribution upon [1].' He finds Rule V. of the York-Antwerp Rules, as to voluntary stranding, based on this same principle. Voluntary stranding, however, is a very exceptional case, having been classed in specified circumstances as Particular Average to prevent the conversion of misfortune of the sea into an apparent intentional sacrifice. It is like several other rules of practice not deducible from principle.

'Who,' asks Arnould, 'can determine that safety, when it does follow, was procured by the means which were used?' (*see above*). It is the practical difficulty, in the mind of this author, rather than any question of justice which seems to underlie the modern English practice on this point.

German law requires that the 'ship and cargo, each either wholly or in part, shall be effectively saved' (Art. 705, *see above*). It will have been observed that by Art. 193 of the Norwegian project, the contrary of this principle is proposed.

Professor Lyon-Caen and M. de Courcy tone the exigencies of French law down to a *résultat utile*, and M. de Valroger, a competent French author, would be glad to see 'the English rule' adopted universally [2].

At Brussels the international rule proposed is in accordance with English practice (*see Art. 4 thereof above*), and therefore contrary to Art. 423 of the French Code of Commerce. It is significant that it was supported by the French official delegate, M. Gonse, judge of the Court of Cassation, who remarked that justice required the adoption of the proposed articles, and that conflicts of interest ought to be avoided [3].

6. Latent defect in the ship or cargo, and default or negligence on the part of the owners thereof or their agents, are dealt with by Art. 7 of the Brussels project, as follows: —

'Les règles relatives à l'avarie commune doivent s'appliquer, même lorsque le danger, cause directe du sacrifice ou de la dépense, a été amené, soit par la faute du capitaine, de l'équipage ou d'une personne intéressée au chargement, soit par le vice propre du navire ou de la marchandise.

'Le recours que donne la faute ou le vice propre est indépendant du règlement de l'avarie commune.'

[1] Vol. iv. p. 186.
[2] See Autran's Revue Internationale de Droit Maritime, 1885-6, p. 422.
[3] Actes du Congrès International de Droit Commercial de Bruxelles (1888), p. 392.

This provision is the contrary of Articles 403 and 405 of the French Code of Commerce, 103 of the Belgian, 700 of the Dutch, 1124 of the Chilian, 1478 of the Argentine, 765 of the Brazilian (*semble*), 809 of the Spanish, and 643 of the Italian Codes, but, as regards the classification of the average, it agrees with the German Law and the proposed Scandinavian Articles, though not in one essential element, viz. in not specifically negativing any claim for contribution on the part of those in fault. It is in accordance with English practice, which would not permit anyone to benefit by his own fault[1].

The French rule[2] and those based on it work injustice in application. A recent judgment of the Court of Cassation in Paris in a case in which the master of the ship by carelessness had placed his vessel in a position which necessitated the sacrifice of some of the cargo, and in which the question was whether the sufferers of the loss had an action against the master or an action for contribution, decided against the latter view. [3]This decision has been warmly discussed by the leading French authorities[4], and is certainly contrary to our current sense of justice.

A most mischievous and exaggerated application of this rule of French law, left in doubt by the French Court of Cassation, has been made by the lower Courts, and resulted in what may be called the 'initial average' theory. This is that the character of average, general or particular, is in principle irrevocably fixed at the moment when either the voluntary act for the common salvation or the accident takes place, this character reacting on all damage which is its necessary consequence. In a judgment of the Court of Cassation of July 16, 1861, the reporting judge, M. d'Oms, however, made a distinction, explaining that 'if the putting into port to

[1] It is interesting, in this connection, to read the remarks made in the last century by the author of a General Treatise of Naval Trade and Commerce as founded on the Laws and Statutes of the Realm (London, 1740), who says in the chapter on Average and Contribution at p. 116 of vol. i.: 'If a ship or vessel be indiscreetly stowed with goods, or the lading is above the berth mark, and an ejection happens, by the Maritime Laws no contribution shall be made, but satisfaction is to be answered by the shipmaster or owners. Where goods or merchandise are laden above the overlop of the ship, or forbidden goods are put on board, and such goods happen to be the cause of any danger or damage, the master shall bear the loss, and he may be also prosecuted for the same. If the master, having received his complement of goods, takes in things without leave of the freighters, and a storm arises at sea in which part of their goods are thrown overboard, the master only shall answer it, and there shall be no average. And for goods brought secretly into the ship without the knowledge of the master or purser, if they are ejected, contribution shall not be had. Leg. Rhod.'

[2] See above, Art. 405 of the Code de Commerce.

[3] Req. 16 Nov. 1881.

[4] See M. Lyon-Caen in Sirey, 1882, M. de Courcy in the Revue Critique de Legislation of 1883, and M. de Valroger, Rev. Int. de Droit Maritime, 1885-6, p. 272, against it; and M. Le Villain in Dalloz, 1883, and M. Desjardins in his Droit Maritime, No. 1019, in its favour.

repair a leak, is in principle a particular damage, according to the terms of the article 403–3° of the Code of Commerce, that principle, true in general, ceases to be so whenever the leak takes proportions considerable enough to compromise the common safety of the vessel, cargo and crew. In this case the putting into port proceeding upon a deliberation taken at the same time for the safety of the vessel and merchandise, changes its character and becomes a general average expense.'

It is surprising that any other notion should be thought possible, that anybody should be capable of holding that it is right to abridge the rights of Paul because Peter has been in fault.

8. The deliberation with the crew has so few defenders nowadays that it can be passed over as a superannuated provision, retained, it is true, in the French Code and some of its imitators, but which cannot be practically carried out in cases of extreme emergency.

Universal Definition—Its Difficulties.

It is seen that to frame a Universal Definition of General Average is no light task, though progress is not unattainable.

German and Scandinavian views are in the main in accord with those of English practice, and on several of the points upon which the French Code and its imitators most differ from them, French writers of eminence tend towards reform in the sense of the English and German principles. Lastly, the resolutions of the International gathering at Brussels, in 1888, show that the views of competent men on the Continent will not block the way to the adoption of homogeneous rules.

It may be asked whether injustice may not arise from laying down hard and fast rules, defining what particular acts are and what are not General Average acts, seeing that the variety of circumstances is infinite, and any particular cases, especially where doubtful, may be varied by attendant circumstances, so as to be now general, now particular. Expediency and the convenience of adjustment are the justification, however, of much deviation from principles, though care should be exercised in distinguishing between cases which are examples of the equitable principles underlying General Average, and cases which expediency classes as such, but which are really exceptional.

The course which therefore seems to commend itself, is to define General Average, and to then distinguish such doubtful applications of the principle as have thus far arisen, classing specifically as Particular Average any exceptional cases which, by their nature, might otherwise be classed as General Average. In so doing a

leaf might be borrowed from the Belgian Code, which distinguishes between acts *which are* General Average acts and acts *which are considered* as General Average acts. (See Arts. 102 and 103.)

I have endeavoured to show where the difficulties in arriving at homogeneous rules on General Average lie, and to make clear that there being still great differences between the various existing laws on the very nature of General Average, the international arrangement of details, irrespective of agreement as to the nature of the institution we are endeavouring to regulate, however useful it may be at home, cannot produce its full effects internationally till we arrive at agreement on questions of principle. I have brought into comparison the different prevalent theories and tendencies on this subject as evidenced in manifestations of opinion at home and especially abroad, and to this I confine myself, leaving it to discussion to bring forth the solutions which practical experience of the questions involved commands.

THOMAS BARCLAY.

P.S.—The Liverpool Conference made no attempt to arrive at a common definition of General Average, and luckily so, as there was not a sufficient variety in the composition of the Conference to make a satisfactory result probable. Rules II and V certainly relate to sacrifices made 'for the common safety,' but as the latter words were not inserted as a matter of principle, but in connection with matters of detail, they must not be considered in any way as a final result of discussion by the Liverpool Conference; the question of a common definition still remains open.

STATUTES OF LIMITATIONS AND MORTGAGEES.

IT was enacted by the Statute 1 Vict. c. 28 that a payment of interest upon a mortgage should give a new starting-point for the running of the Statute of Limitations against a mortgagee out of possession. The class of persons, however, by whom the payment should be made was not defined in express terms by the Act, but was left to be ascertained by a process of judicial development. No one has ever contended that the class includes those who are strangers both to the mortgaged estate, and to the mortgage debt. Nor has anyone denied that the owners of the equity of redemption are competent to make the payment which the Act contemplates. But within these limits there lies a debatable ground. A person who is liable to be sued *ex contractu* for payment of the mortgage debt, while he possesses no estate in the equity of redemption, can be referred neither to the one class nor to the other. What is the legal effect of a payment of interest made by him on account of the debt? Did the Legislature intend to confer upon him the power of suspending the operation of the Statute while it was in process of conveying an estate in fee-simple to the person in possession of the land subject to the lien of the mortgage?

This question, in the year 1886, arose for decision before two Courts of the highest authority. The Judicial Committee of the Privy Council in *Lewin* v. *Wilson*, 11 App. Ca. 639 answered it in the affirmative. The Court of Appeal in *Newbold* v. *Smith*, 33 Ch. Div. 127, answered it in the negative. In the former of these cases money, advanced upon a joint and several bond of *A* and *B*, was secured by a mortgage upon the land of *A* and by a mortgage upon the land of *B*. Payment of interest by *A* was held to preserve the lien of the mortgage of *B*, although *B* and his devisee had occupied the mortgaged premises without acknowledgment of the title of the mortgagee for more than thirty years. In the latter case payment of interest by the mortgagor, who remained liable *ex contractu* to pay the debt though he had aliened the equity of redemption, was held insufficient to preserve the lien of the mortgage. A conflict of judicial opinion so remarkable suggests a doubt whether the elementary principles applicable to Statutes of Limitations have yet assumed such a form as to afford a safe guide in determining the validity of Parliamentary titles to land. The law is settled for

the Colonies by the judgment of the Judicial Committee. But the House of Lords, affirming the judgment in *Newbold* v. *Smith*, 14 App. Ca. 423, did not find it necessary to express any opinion upon the construction of the Statute. Lord Macnaghten says, at p. 428, 'With regard to the important point on which the Court of Appeal principally founded their judgment, I desire to say that I express no opinion upon it.' And Lord Herschel describes it as a 'serious question, and one of general importance.'

The manner in which the class of persons referred to shall be defined is, consequently, still open for discussion in the jurisprudence of England.

Upon a review of the whole subject, the current of judicial opinion would seem to run strongly in favour of the view of the Court of Appeal. It may not therefore be without value to call attention to the principles and authorities which support that view, a proceeding which would have been superfluous if the eminent judges composing that Court had not considered the question too clear to call for elaborate investigation.

Sections 2 and 40 of the Act 3 & 4 Wm. IV, c. 27, and the Act 1 Vict. c. 28, which are material to the present discussion, may be briefly set forth as follows:

Section 2. 'No person shall make any entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or bring such action shall have first accrued,' &c.

Section 40. 'No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent,' &c.

1 Vict. c. 28: 'It shall and may be lawful for any person entitled or claiming under any mortgage of land to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage,' &c.

The Act 1 Vic. c. 28 was passed for the purpose of supplying a *casus omissus* in 3 & 4 Wm. IV, c. 27. It must therefore be read as *in pari materia* with that Act and not as an isolated piece of legislation. That Statutes passed *in pari materia* must be read together as one

code of law is not only well established as a general principle, but has been specially applied to Statutes of Limitations. Thus Abbot C.J. says in *Murray* v. *The East India Company*, 5 B. & Ald. at p. 215, 'The several Statutes of Limitations being all *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same.' If then any general principle can be said to form the basis of the interpretation of 3 & 4 Wm. IV, c. 27, the same principle should be applied in the construction of the later Act, unless it is made clear by the language of that Act that mortgagees were not intended to be governed by the same rule as was made applicable to all other owners of land out of possession. Now there is a consensus of judicial opinion in support of the doctrine that where the true owner of land is out of possession, and another person is in possession for a definite period, the legal estate is conveyed from the former to the latter by the operation of the Statute. It will be sufficient to cite the opinion of Lord St. Leonards in *Scott* v. *Nixon*, 3 D. & W. 407, in support of this view. 'I was asked where, or in whom, was the legal title? I reply that the Statute has executed a conveyance to the person whose possession is a bar. The Statute makes the title, for by its operation it extinguishes the right of the one party, and gives legal force and validity to the title of the other, the party in possession.'

The Judicial Committee has lately affirmed the necessity of continuous possession in the person claiming the statutory title as the very foundation of his right. *Agency Co.* v. *Short*, 13 App. Ca. 799. It might be inferred from this decision, but for the case of *Lewin* v. *Wilson*, 11 App. Ca. 639, that they would hold that uninterrupted possession maintained for the statutory period, without any acknowledgment of the title of another, would avail to transfer the estate. Why attach so much importance to long-continued possession, if the legal inference from it is to be nullified by acts which the person in possession did not authorize, and which he could not prevent?

Continuity of possession being thus an essential element in the Parliamentary title, it was provided by sec. 14 that a written acknowledgment of the title of the person entitled to any land should give a new point for the running of the Statute. By sec. 35 a similar effect is attributed to a payment of rent, the receipt of which is deemed to be the receipt of the rents and profits. The Statute puts such a receipt upon the same footing as actual possession. It is probable that the written acknowledgment and the payment of rent were considered, each of them, to be in the nature of a symbolical delivery of possession of the land. A key is here

provided to unlock the meaning of the Act. For it is reasonable to suppose that when the Legislature found it necessary to pass the Act 1 Vict. c. 28 in order that payment of interest on a mortgage might give a new point for the running of the Statute, it was not intended to introduce a system of law entirely at variance with that which already existed. The legal effect of an acknowledgment in writing, or a payment of rent being confessedly limited to the preservation of the right of the true owner against the person by whom either of these acknowledgments was made, no reasonable grounds can be suggested for attributing a more extensive operation to that acknowledgment which is involved in a payment of interest. That a payment of interest may be accurately defined as an acknowledgment was clearly the view of the Court of Appeal in *Harlock* v. *Ashberry*, 19 Ch. Div. 539. Brett L.J. says at p. 548, 'It seems to me that in all Statutes of Limitations the principle on which they are founded is that in those cases in which a payment is allowed to take the case out of the operation of the Statute it must be such a payment as amounts to an acknowledgment of liability.'

The right of entry of a mortgagee under the Act 3 & 4 Wm. IV, c. 27, accrues at the date of the mortgage, and is not deferred until the debt becomes due. That sec. 2 applies as well to the defeasible title of a mortgagee as to an absolute title is clear (*Doe dem Roylance* v. *Lightfoot*, 8 M. & W. 553). After the lapse of the statutory period the title of the mortgagee is extinguished by sec. 34. It would therefore seem at the first glance that sec. 40 would be irrelevant, since the bar of the Statute is complete without it. But if after the debt becomes due the running of the Statute should be suspended by a payment of rent or a written acknowledgment, sec. 2 would no longer apply; and sec. 40 would impose a bar to any suit which may directly or indirectly lead to the payment of the debt. It is thus possible to state a case in which sec. 40 would have a direct bearing upon mortgagees. And if it can apply in one case, it may legitimately be referred to for the purpose of furnishing a rule in all. But while sec. 40 imposes a bar, it was doubtful whether the payment of interest which it contemplates could give a new point for the running of the Statute. The Act 1 Vict. c. 28 was passed to remove this doubt. In substance this Act simply inserts affirmative words in sec. 40 in order that a mortgagee might be entitled to institute proceedings to recover the land within twenty years after the last payment of interest,—words which had been omitted *per incuriam* when the principal Statute was passed. A distinction has been pointed out between the language of sec. 40 and the language of 1 Vict. c. 28. The former, it is said, is confined

to cases for the recovery of money, while the latter enables the mortgagee to recover the land; per Lord Westbury, *Chinnery* v. *Evans*, 11 H. L. at p. 133. But it is probable that the Legislature used the varying phraseology of the two Acts to express the same idea. Whether the suit is a suit to recover money charged upon land or a suit to recover the land, it is equally a proceeding *in rem*. No proceeding *in personam* is known to equity practice to which the language of sec. 40 can be referred.

The owner of the land subject to the charge is the only person authorized to make the written acknowledgment contemplated by sec. 40. And the legal effect of such an acknowledgment is limited to the preservation of the lien of the mortgage upon the land in his possession. This was held by Lord Westbury in *Bolding* v. *Lane*, 1 De G. J. & S. 122, when giving a construction to the language of sec. 42, which is the same as the language of sec. 40. The payment contemplated by sec. 40 must obviously be made by those persons only who are competent to make the written acknowledgment; and with the same, and no greater, effect in preserving the remedy of the mortgagee. The object of the section is to bar the remedy where it is sought to recover money 'secured by a mortgage' and 'payable out of land.' The payment and the written acknowledgment are classed together. The written acknowledgment must be given by the person by whom the debt shall be payable; that is to say, by the owner of the equity of redemption. The payment also must be made by the owner of the equity of redemption, for he is the only person by whom the debt payable out of land is to be paid. See a learned note to *Martin* v. *McCausland*, 3 Irish L. R. 129.

The Judicial Committee of the Privy Council in *Lewin* v. *Wilson*, 11 App. Ca. at p. 644 say, 'It has been doubted whether the words which require that acknowledgment shall be given by the person by whom the money shall be payable, or his agent, apply also to payment.' The distinction between a payment and a written acknowledgment, when considered apart from the Statute, is too obvious to require discussion. But the real question is, what is the meaning of section 40? The process of reasoning by which the right of making the written acknowledgment under that section is limited to the person in possession of the land sought to be charged, while the right of making the payment is conferred upon a class so extensive as to include not only these persons, but also all others who are liable to be sued *ex contractu* for the payment of the mortgage debt, is not self-evident, nor has it ever been drawn forth in an explicit form.

The question is really concluded by authority, if it be allowable

to rely on the decided cases not only for the propositions actually determined, but for the soundness of the reasoning by which the conclusions were reached. It was held in *Chinnery* v. *Evans*, 11 H. L. 111, that a payment of interest made by a Receiver appointed over a mortgage estate consisting of several parcels of land was sufficient to preserve the lien of the mortgage upon the whole estate, even though some of the tenants had paid no rent during the whole of the statutory period. This case really turned upon the construction of the Act 1 Vict. c. 28. For the question to be determined was the legal effect of a payment of interest. And under the earlier Act it was doubtful whether the mortgage title would not have been extinguished by the lapse of time, even if the interest had been regularly paid by the owner of the equity of redemption. The chief value of this case consists in the reference to section 40 of 3 & 4 Wm. IV, c. 27, for the purpose of giving a construction to the later Act. Lord Westbury, after stating at p. 132 that the same *ratio decidendi* would apply to 1 Vict. c. 28 as to the 40th section of the earlier Act, proceeds to consider whether the words 'by whom the same shall be payable or his agent' apply to both cases, that is to say, to the case of payments of interest as well as to the case of acknowledgments, and he concludes, 'I think they certainly do.' What can be the point of this reasoning, if his lordship did not intend to hold that these words were to be read by implication as a qualification of the word 'payment' in the Act 1 Vict. c. 28? If it was not his opinion that the payment contemplated by that Act must be made by the owner of the equity of redemption, it is difficult to say that his language means anything at all. His dictum at p. 132, that money paid by a stranger to the mortgage contract could not suspend the operation of the Statute, because it would be made 'by a party not in any respect subject to liability,' is plainly *obiter*, and is not equivalent to an opinion that a payment by a person concerned to satisfy the contract would have such an effect. The force of this dictum is neutralized, however, by the dictum of Lord Wensleydale in the same case at p. 141: 'A receipt of interest on a mortgage, simple possession of the subject-matter by an act of ownership, is sufficient.' That great judge evidently considered that the payment of interest contemplated by the Act must be equivalent to a symbolical delivery of possession of the land. If this observation of Lord Wensleydale is considered in connection with the reasoning of Lord Westbury upon the 40th section of the principal Act, it is difficult to assert that this case is not an authority for the proposition that the payment of interest contemplated by 1 Vict. c. 28 must be made by the person 'liable to pay,' that is to say, by the owner of the equity of redemption, alone.

Harlock v. *Ashberry*, 19 Ch. Div. 539, professed to be a development of the doctrine of *Chinnery* v. *Evans*. In this case a bill had been filed for the foreclosure of a mortgage including three parcels of land. The Statute of Limitations was *prima facie* a bar. In the view which the Court took of the case, it was incumbent upon the plaintiff to remove the bar of the Statute by producing evidence to satisfy the requirements of 1 Vict. c. 28. For this purpose the plaintiff relied upon a payment of rent which he had exacted from the tenant of one of the parcels of the mortgaged estate. Their lordships held that the payment contemplated by the Act was a payment of interest by the owner of the equity of redemption, and that the plaintiff had not brought his case within that rule. From the primary rule that the payment must amount to an admission, they deduce the secondary rule that it must be made by a person 'liable or entitled to pay the debt.' The class of persons indicated by the secondary rule cannot be more extensive than the class indicated by the primary rule. The only persons competent to make an admission affecting the land are the owners of the land or their agents. The owners of the land are therefore indicated by the expression 'liable to pay.' And those who stand in such a fiduciary relation to the owners of the land as to be competent to make admissions on their behalf, are indicated by the expression 'entitled to pay.' The person entitled to pay must be some such person as a receiver, a guardian, of an infant, or a committee of a lunatic. The term 'entitled to pay,' as used in this case, cannot be held to include a person liable *ex contractu* to pay the debt, but possessing no interest in the equity of redemption, without subverting the whole of the reasoning upon which the learned judges proceed.

The Judicial Committee in *Lewin* v. *Wilson*, 11 App. Ca. at p. 645, say: 'In *Harlock* v. *Ashberry* the judges considered that the principle which underlies the Statutes is that the payment must be an admission, but they do not discuss the question how far a payment by *A* may be an admission of right against *B*.' If *A* is the agent of *B*, then the payment in law is made by *B*. But if *A* is not the agent of *B*, then it is a misuse of legal terminology to call it an admission by *B* at all. The process of reasoning upon which the learned judges dispose of the controversy in *Harlock* v. *Ashberry*, seems to be as follows. Statutes *in pari materia*, expressed in similar language, must receive the same construction. If the 40th section could be so construed as to end at the word 'paid,' then whatever might be the meaning of the word 'paid' in that section, the same, and no wider, meaning must be attributed to the word 'payment' in 1 Vict. c. 28. But if the words 'by whom the same

shall be payable' can be associated with the word 'paid' by grammatical construction, then it would be consistent with legal principle to say that, as the Legislature had used different language in the two Acts, the class of persons competent to make the 'payment' under 1 Vict. c. 28, might be more comprehensive than the class of persons by whom the money might be paid under the earlier Act. Brett L.J. says at p. 548, 'It seems to me impossible to read these words which have reference to signature into the previous paragraph relating to payment;' and referring to the construction which the House of Lords had put upon sec. 40 in *Chinnery* v. *Evans*, 11 H. L. 115, he proceeds at p. 549: 'They construed the former part of the section as if it had stopped at the word 'paid;' and construing the section as if it ended there, they came to the conclusion that by a necessary implication, on the ground of the Statute being a Statute of Limitations, and the payment therefore of necessity being an acknowledgment of right, the word 'payment' involved the addition 'by the person by whom the same shall be payable or his agent.'

A great living writer has described the theory of development in theological dogma in terms which are equally applicable to the evolution of legal doctrine. 'One proposition,' he says, 'necessarily leads to another, and a second to a third; then some limitation is required; and the combination of these opposites occasions some fresh evolutions from the original idea, which indeed can never be said to be entirely exhausted. This process is its development, and results in a series or rather body of dogmatic statements.' Following this law, learned judges are accustomed to lay down propositions which shall be sufficient to dispose of the case before them. Thus they have said that the payment of interest which shall suspend the operation of the Statute must amount to an admission. It must be made by the person liable to pay. It must be made by the person entitled to pay. Then they lay down a limitation. It cannot be made by a person who is not liable *ex contractu* to pay the debt. These propositions may all be true. And yet none of them was exhaustive. Each of them was but an expedient for practical purposes, not a true analysis of the idea which really underlies the Statute. What then is that idea? It is submitted that it is contained in the judgment of the Court of Appeal in *Newbold* v. *Smith*, 33 Ch. Div. 127. The following formula expresses that view in a somewhat modified form. The payment of interest which shall suspend the operation of the Statute upon the estate of a mortgagee out of possession, must be made by the person in possession of the mortgaged lands in whose favour the Statute is running, and the legal effect of the payment must be limited to

the preservation of the lien of the mortgage upon the land in his possession.

The case of *Doe dem Palmer* v. *Eyre*, 17 Ad. & El. N. S. 366, apparently militates against this doctrine, but in reality sustains it. In that case, as between landlord and tenant, the Statute had transferred the estate to the tenant. But as between the mortgagee of the reversion and the tenant, the mortgage-title had been preserved by a payment of interest made by the mortgagor, the landlord, while the Statute was running. Here then is a case where a person had occupied the mortgaged premises for the statutory period, without acknowledgment, yet he did not acquire the estate. But the occupation of the tenant has always been held to be the possession of the landlord. If neither landlord nor tenant had the title, the Statute would run in favour of the landlord, not the tenant. This case, therefore, is a distinct authority in favour of the doctrine suggested. For the payment was made by the person in possession of the land, in whose favour the Statute was running. The ambiguity in the terms 'liable' to pay, and 'entitled' to pay has already created confusion. It would therefore seem to be desirable, in the interests of sound legal development, that they should be laid aside.

The judgment of the Judicial Committee in *Lewin* v. *Wilson*, 11 App. Ca. 639, proceeds upon the view that the faithful performance of contracts is of paramount importance. And in fact it is hardly possible to overestimate its importance. It constitutes the foundation of civil society. But it is universally conceded that rights which have been long slept upon should not be enforced. This view has taken form in the Statutes of Limitations. To apply these two principles in such a manner that neither of them may intrude upon the sphere which belongs to the other, requires the nicest discrimination. It may assist in preserving the true proportion between these conflicting principles to bear in mind that the great object of the Legislature in passing the Statute, was to furnish rules, simple in statement and easy of application, for determining the validity of titles to land.

In order to divert attention from this object, various reasons have been advanced why a person liable *ex contractu* alone should be allowed to control the legal relation which is created by the lapse of time between the mortgagee and the person in possession of the mortgaged estate. A devisee of a mortgagor, it is said, receives the benefit of a payment of interest by the executor in the reduction of the debt. He receives the benefit of a release to the executor in the extinguishment of the debt. Why then should he not experience the disadvantage of the payment in the preservation of the lien?

Should the mortgagee be compelled to foreclose the mortgage against the devisee while he is regularly receiving the interest from the executor? These objections might be entitled to attentive consideration if it were the intention of the Legislature simply to determine the rights of the parties *inter se*. But they lose their significance when they are made use of for the purpose of introducing uncertainty into a department of law where the public interests imperatively require that certainty should be readily attainable.

The person who is liable *ex contractu* to pay the debt, while he possesses no estate in the equity of redemption, is in reality rather identified with the creditor than with the party in possession of the land. Not only has he nothing substantial to lose by a single payment of interest, but he has everything to gain. For the foreclosure of the mortgage would be an extinguishment of the debt.

Upon comparing the two views which have been discussed, it will be seen that the Judicial Committee treat the Act 1 Vict. c. 28 as an isolated piece of legislation, and make a new departure in its interpretation. The Court of Appeal, on the other hand, read the Act 1 Vict. c. 28 as *in pari materia* with existing legislation; they develop principles implicitly received by the legal profession ever since Lord St. Leonards made his masterly contemporaneous expositions of the Statute; and they avoid the absurdity of holding that the operation of the Statute in conveying the estate to the person in possession is contingent upon facts, the existence of which the greatest diligence would be unable to ascertain. If the view of the Court of Appeal should be sustained by the highest tribunal in the empire it will be possible, by resorting to the person in possession of the land, to learn whether the conditions upon which the Statute makes a good title actually exist. But if, on the other hand, the view of the Judicial Committee should be adopted, a field of inquiry would be opened up so wide that it would be no exaggeration to call it boundless. For there is no limit to the number of collateral contracts which may be made for the purpose of securing the repayment of money lent on a mortgage. No title, in that event, could ever be made to a property upon which an unpaid mortgage had been at any time a charge.

THOMAS MILLIDGE.

BANKRUPTCY OF PARTNERS.

THE law of bankruptcy, if it exists for any purpose, exists for the purpose of fairly distributing the property of the debtor amongst his creditors. Is this purpose effected in the case of partners? This is a question of importance to all who desire to see law synonymous with justice, but especially to those persons of the mercantile community who are in the habit of giving credit to partnership firms. It is accordingly proposed to examine the method of distribution which prevails in England, to compare it with the Scotch method, and finally to suggest an alternative which, it is believed, strikes the mean between the English and Scotch rules, is the fairest method of distribution, and yet is entirely consistent with the English law of partnership.

The subject perhaps most readily presents itself in the form of a problem which may be thus stated:—*Given*. *A* and *B* partners—insolvent. *Problem*. Distribute the partnership property and the separate estates of the individual partners most fairly among the creditors of the firm and of the individual partners.

This problem extends over a wide field of inquiry, and, in the form in which it has been stated, relates to all cases of insolvency. It is, however, proposed to confine the present discussion to those cases of insolvency which are more strictly classified under the head of bankruptcy, leaving it to be inferred that the rule of distribution in all cases of insolvency should be the same. It is impossible within the limits of the present article to do more than sketch the outline of the difficulties which beset the inquirer at every step. The primary difficulties lie in the questions, 'What is a firm?' 'What is meant by partnership property?'

A partnership firm, according to our law, is merely a collection of individuals, and the word 'firm' is used as a convenient expression comprehending all the partners in their collective business capacity as partners, and not in any corporate sense, and is therefore widely distinguishable from an incorporated company.

Partnership property is regarded as a common fund, which has been made up by contributions from the partners as a nucleus for profit and a provision against loss. In this property each partner possesses an interest of a peculiar nature called his share, which consists of that proportion to which he is entitled after all partner-

ship debts are paid. There is, moreover, an important principle that 'in order to discharge himself from the liabilities to which a person may be subject as a partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm' (Lindley on Partnership (1888), p. 351). It is by virtue of this right, which is technically termed the partner's 'lien,' that a partner who has paid a partnership debt is entitled to be indemnified or repaid out of the partnership property. That this right partakes of the nature of a right to indemnity appears to be supported by the following passage from Lord Justice Lindley's Treatise on Partnership: 'When a retiring partner assigns his interest in the partnership assets and obtains from the continuing partners a covenant of indemnity, his lien on the partnership assets seems to be at an end' (p. 451). It seems therefore that partnership property is, so far as it is intended to provide against loss, a fund set apart and appropriated by mutual consent for the specific purpose of paying partnership debts and indemnifying the partners therefrom. The importance of this view and its bearing upon the suggested solution will be perceived later.

Having so far cleared our ground, and stated what to many lawyers may sound elementary propositions, let the original problem be stated in a concrete form. Let us now suppose the following facts:—

A and *B* are partners.
A's separate estate = £10,000
B's " " = £5,000
The partnership property = £5,000

Let us also suppose that:—

A's separate debts are £20,000
B's " " £20,000
The partnership " £40,000

There exists therefore a total amount of £20,000 to be distributed in some way among the partnership creditors and the separate creditors of *A* and *B* in accordance with their respective rights. How is this to be done?

We are now met by a further difficulty. What is a partnership debt? To a mind unclouded by the study of English bankruptcy law a partnership debt is only distinguishable from a separate debt on two grounds, namely, that it is owed by both *A* and *B*, and was incurred in the course of the partnership business. It might therefore be naturally inferred that a partnership creditor is as much a creditor of *A* as a separate creditor, and therefore that, in whatever way the partnership property is distributable, at any rate the

partnership creditor can recover his debt from both *A*'s and *B*'s separate estates in competition with the separate creditors. Such indeed is the view taken by our law in the case of levying execution for a partnership debt. When a creditor has obtained judgment against a firm, he may levy execution for his debt against the property of each partner as well as the partnership property. He is considered to be the creditor of each (see Rules of Supreme Court, 1883, Ord. XLII, r. 10). The same view was at one time adopted in bankruptcy by Lord Thurlow during the period that he was Lord Chancellor, but unfortunately a different practice became established which Lord Eldon reluctantly followed, although he would rather have adhered to Lord Thurlow's view (see *Ex parte Hill*, 2 B. & P. N. R. 191 n.).

The existing rule in England is contained in the Bankruptcy Act, 1883, sect. 40, subs. (3), where it is enacted as follows:—

'In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts.'

The remainder of the subsection provides for the distribution of the surplus in the following words:—

'If there is a surplus of the separate estates, it shall be dealt with as part of the joint estate.

'If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.'

There is a fascinating simplicity about the whole of this rule. It is certainly simple to state and equally easy to administer. Is it a fair method of distribution? Does it do justice to all parties? Why is the partnership creditor shut out from his share of the separate estates? Have the separate creditors no rights against the partnership property? A careful consideration of these and similar questions supplemented by an examination of the existing law have led to the following criticism of the rule.

(*a*) It is artificial, being founded upon no intelligible principle, and is inconsistent with the principles of the law of partnership.

(*b*) It has founded the doctrine that partnership property is an 'estate' which has introduced further anomalies into the bankruptcy law.

(*c*) It has spread these evils to other Courts, where the administration of insolvent estates has been assimilated to the law of bankruptcy.

(*d*) It is unfair in practice to the partnership creditors in cases

where the partnership property is small and disproportionate with the separate estates.

The existing rule in Scotland may be thus stated:—

'Upon the sequestration of co-partners their separate estates are applicable to the payment *pari passu* of their respective separate debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy [1].'

The principal objection to be made to this rule is that it is based upon a different conception of the nature of a partnership to that which obtains in England. Whether it is consistent with the Scotch law of partnership is immaterial for the present purpose. The Scotch rule treats the firm as a distinct person, and the partnership property as the 'estate' of such person. This view is clearly opposed to the principles of the English law of partnership, and if adopted in England would have the effect of abolishing one of the main distinctions between a partnership and an incorporated company, without the principal safeguards of the latter. The Scotch view seems similar to what Mr. Cory, in his treatise on Mercantile Accounts, describes as the mercantile principle [2]. This so-called mercantile principle might be more truly called the operation of an accountant who is ignorant of the principles which govern the law of partnership. The system of accounts by which the 'firm' is treated as a distinct person is convenient, and works correctly while the business is a going concern, but entirely breaks down and produces unjust results when the partners are insolvent.

The Scotch rule seems therefore open to the following criticism:—

(*a*) It is based upon the wrong principle that partnership creditors have contracted, not only with the partners themselves, but with the partnership firm as a distinct person—a principle which in English law is properly confined to the case of incorporated companies.

(*b*) In practice it produces great hardship to the separate creditors.

In the course of an inquiry under the Mercantile Law Commission of 1854 [3], the English and Scotch rules were compared and opinions were invited as to which of the two methods of distribution was the best, and it is interesting to note the conflict on the matter. The result shows a preponderance of opinion in favour of the English rule, but the fact that there was so much difference of

[1] See Bell's Digest of the Law of Scotland, 1882, p. 706. See also Sir Frederick Pollock's Digest of the Law of Partnership, 5th ed. 1890, pp. 142 et seq., where the English and Scotch rules are discussed, and some valuable information as to the rules in other countries has been collected.

[2] Cory on Mercantile Accounts (1839), from which Lord Justice Lindley cites a passage in his Treatise on Partnership (1888), p. 696.

[3] Parliamentary Papers, 1854-5. 18. iv. See Appendix, p. 99.

opinion suggests that neither rule produces correct results in all cases; and upon examination this conclusion is supported by the examples which will be given.

An alternative method of distribution has suggested itself to the writer, who believes that the true view is that the partnership creditors are entitled to prove against the separate estates, and that if they do so, the separate creditors are entitled to insist that they shall be indemnified out of the partnership property to the extent to which the separate estates have been reduced by payment of partnership debts. Subject to this indemnity the partnership creditors are entitled to apply the partnership property in payment of their debts. This view recognises, and is based upon, three leading principles in the English law of partnership:—

(i) A partnership creditor is a creditor of each of the partners.

(ii) Partnership property is primarily applicable in payment of partnership debts.

From the second of these two principles springs a third, which has in the consideration of this problem been hitherto ignored and which is, as it were, the connecting link between the first and second, and reconciles the apparent injustice of allowing the partnership creditor to proceed against the separate estates and at the same time against the partnership property. This is the principle of indemnity.

(iii) A partner who has paid a partnership debt is entitled to be indemnified out of the partnership property.

In accordance with these principles the following rule is suggested as an alternative solution of the problem.

'Apply each separate estate in payment of its separate debts *pari passu* with partnership debts:

'Apply the partnership property in paying separate creditors their unpaid debts to an amount not exceeding the amount contributed to partnership debts by each respective separate estate,

'And subject thereto in paying partnership creditors their unpaid debts.'

In framing this rule, no provision is expressly made for a possible surplus of partnership property after payment in full of all partnership debts. This can easily be done, but for the present purpose is considered unnecessary. It is obvious that such surplus is divisible among the separate estates in proportion to the interest of each partner.

The following advantages are claimed for the suggested solution:—

(*a*) It is consistent with the English law of partnership, and gives the fullest possible effect to the agreement of the partners.

(*b*) It offers a method of distribution based upon legal principles, and renders unnecessary the artificial doctrines which have sprung from the existing English rule [1].

(*c*) In practice it gives the fairest results in all cases.

EXAMPLE I.

Suggested Rule. 'Apply each separate estate in payment of its separate debts *pari passu* with partnership debts:'

A's separate estate £10,000	*B*'s separate estate £ 5,000
A's separate debts £20,000	*B*'s separate debts £20,000
Partnership debts £40,000	Partnership debts £40,000

Therefore

A's separate creditors receive £3,333 6*s*. 8*d*. or 3*s*. 4*d*. per pound.
B's separate creditors receive £1,666 13*s*. 4*d*. or 1*s*. 8*d*. per pound.
Partnership creditors receive £10,000 or 5*s*. per pound.

Such is the result where there is no partnership property, both under the suggested rule and under the Scotch rule.

Formerly in England, in cases where there was no partnership property and no solvent partner who could be sued, the law, by way of exception to the English rule, allowed partnership creditors to prove in competition with the separate creditors against the separate estates, and therefore, unless the law has been altered, we should arrive at the same result as the suggested rule.

It is, however, doubtful whether the law in this respect still holds good. This exception is not mentioned in the Bankruptcy Act, 1883, and it has been suggested by high authority [2] that it was possibly the intention of the Legislature that such exception should no longer be law.

If this suggestion is well-founded and the exception, which certainly seems as artificial as the rule, is repealed, we are met by the startling conclusion that where there is no partnership property and no partner able to pay his separate creditors in full, the partnership creditors receive *nothing*.

Treating this question as unsettled and the discussion of it as a digression, let us proceed upon the assumption that there is partner-

[1] Especially the rule that a partnership creditor who holds a security upon the separate estate of any of the partners may prove against the partnership property without deducting such security.

[2] See Mr. Justice Vaughan Williams' Treatise on Bankruptcy (1886), pp. 127, 128. [But in the last (1888) ed. of Lindley on Partnership, 731, the old rule is stated as existing.]

ship property to the amount of £5,000. It now becomes necessary to apply the second portion of the suggested rule.

'Apply the partnership property in paying separate creditors their unpaid debts to an amount not exceeding the amount contributed to partnership debts by each respective separate estate':—

Partnership property £5,000

A's contribution . £6,666 13*s.* 4*d.* } £10,000
B's contribution . £3,333 6*s.* 8*d.* }

Therefore the separate creditors are indemnified, or receive back from the partnership property half the amount which their respective estates have contributed to partnership debts, and adding this to what they have already received, we arrive at the following total result:—

A's separate creditors receive £6,666 13*s.* 4*d.* or 6*s.* 8*d.* per pound.
B's separate creditors receive £3,333 6*s.* 8*d.* or 3*s.* 4*d.* per pound.
Partnership creditors receive £10,000 0*s.* 0*d.* or 5*s.* 0*d.* per pound.

Thus the insufficiency of the partnership property to meet the partnership debts is fairly shared by the separate creditors, and does not fall wholly (as it would under the English rule) to the prejudice of the partnership creditors, or (as it would under the Scotch rule) to the prejudice of the separate creditors.

English Rule. 'Apply the joint estate in the first instance in payment of the joint debts and the separate estate of each partner . . . in payment of his separate debts:'

A's separate estate £10,000 *B*'s separate estate £ 5,000
A's separate debts £20,000 *B*'s separate debts £20,000
Partnership property . £ 5,000
Partnership debts . . £40,000

Therefore

A's separate creditors receive £10,000 or 10*s.* per pound.
B's separate creditors receive £ 5,000 or 5*s.* per pound.
Partnership creditors receive £ 5,000 or 2*s.* 6*d.* per pound.

Under this rule and in these circumstances the separate creditors of *A* and *B* are relatively in a better position than the partnership creditors of *A* and *B*. These partnership creditors who gave credit to and trusted both partners receive half of the amount which the separate creditors of *A* alone receive, although their debts are double the amount of the debts owing to *A*'s separate creditors.

Scotch Rule. 'Apply the separate estates in payment *pari passu* of their respective separate debts and of so much of the partnership debts as the partnership estate is insufficient to satisfy:'

Partnership debts . .	£40,000
Partnership property .	£ 5,000
Deficit	£35,000

A's separate estate £10,000	*B*'s separate estate £ 5,000
A's separate debts £20,000	*B*'s separate debts £20,000
Partnership debts £35,000	Partnership debts £35,000

This method gives the following total result:—

A's separate creditors receive £3,636 7*s*. 3$\frac{1}{4}$*d*. or 3*s*. 7$\frac{1}{2}$*d*. per pound.
B's separate creditors receive £1,818 3*s*. 7$\frac{1}{2}$*d*. or 1*s*. 9$\frac{3}{4}$*d*. per pound.
Partnership creditors receive £14,545 3*s*. 7$\frac{1}{2}$*d*. or 7*s*. 11$\frac{1}{4}$*d*. per pound.

Obviously under this rule the partnership creditors obtain an enormous advantage over the separate creditors, who are excluded from all rights in the partnership property.

Example II.

The first example was taken as a type of a large number of cases which occur in the bankruptcy of partners. It will be found that, given the supposed facts in the first example, whenever the partnership property is below a certain amount (in this case £10,000, that is, the total amount to which the separate creditors of *A* and *B* are entitled to be indemnified) the three rules will give different results. Now let us suppose that the partnership property is £20,000 (the other figures being the same), and upon applying the suggested rule it is found that we arrive at the same result as the English rule but different to the Scotch rule.

Suggested Rule. There is no need to repeat the preliminary results arrived at under this example, as they are the same as in the first example.

Partnership property	£20,000
A's contribution . .	£6,666 13*s*. 4*d*. } £10,000
B's contribution . .	£3,333 6*s*. 8*d*. }

In this case the separate creditors receive back the full amount which has been contributed to partnership debts, and are therefore fully indemnified. A surplus of £10,000 is left for distribution among the partnership creditors and the third portion of the suggested rule is brought into play:—'and subject thereto [apply the partnership property] in paying partnership creditors their unpaid debts:'

Amount of partnership property remaining after indemnifying separate creditors £10,000

Unpaid partnership debts £30,000

The total result is that:—

A's separate creditors receive £10,000 or 10*s*. per pound.
B's separate creditors receive £5,000 or 5*s*. per pound.
Partnership creditors receive £20,000 or 10*s*. per pound.

English Rule. The total result, although reached in a different way, is the same. This coincidence suggests, as a probable explanation of the English rule, that it was in fact a crude attempt to compensate or indemnify the separate creditors for what would otherwise have been the injustice of allowing (as in the Scotch rule) the partnership creditor to exhaust both funds—that is, both the partnership property and the separate estates—in payment of his debts.

Scotch Rule. Upon applying this method we arrive finally at the following total result:—

A's separate creditors £5,000 or 5*s*. per pound.
B's separate creditors £2,500 or 2*s*. 6*d*. per pound.
Partnership creditors £27,500 or 13*s*. 9*d*. per pound.

Example III.

It has been seen by the first and second examples that, in proportion as the partnership property increases in amount so do the three rules tend to coincide. It will be found that, under the circumstances stated, the Scotch rule does not produce the same result as the other rules until the partnership property is equal to or greater than the amount of the partnership debts. Let us suppose that the partnership property amounts to £40,000 (the amount of the partnership debts), and we find that all three rules produce the following identical result:—

A's separate creditors receive £10,000 or 10*s*. per pound.
B's separate creditors receive £5,000 or 5*s*. per pound.
Partnership creditors receive £40,000 or 20*s*. per pound.

No example is given where the partnership property exceeds the amount of the partnership debts, but it is obvious that in such a case the surplus is divisible between the separate estates in proportion to the interest of each partner.

Enough has, it is hoped, been said to show the differences between these three methods of distribution, and also to show that, if the

suggested solution of the problem is the true one, the English rule is daily working injustice in a large number of cases by unduly favouring the separate creditors, but that if the Scotch rule were adopted in this country that partnership creditors would be unduly favoured, and greater injustice would be done in a still larger number of cases.

These conclusions, if correct, are of themselves sufficient reasons for the amendment of the existing rule in England, a rule which may be described as a blot upon the fair administration of an important branch of our mercantile law, and which tends to justify that repugnance, approaching to disgust, with which the law of bankruptcy in England has hitherto been regarded by the commercial world.

A. Turnour Murray.

Note.– This article was written and printed before the passing of the Partnership Act, 1890 (53 & 54 Vict. c. 39). The Act, which is mainly declaratory of existing law, does not alter the methods of distribution on bankruptcy either in England or Scotland, and, so far as it bears upon the above argument, seems rather to support the writer's view of the general principles of the law of partnership. No alteration in the original form of the article has therefore been made. A. T. M.

A CONVEYANCER IN THE THIRTEENTH CENTURY[1].

AMONG the monuments of the legal industry of the great age which saw English law becoming a science, the age of Edward I, there are, I am assured, many collections of precedents in conveyancing, which await an editor. Lately, while looking for other things, I happed on three in our Cambridge Library: they are contained in the MSS. Ee. i. 1 (f. 225), Dd. vii. 6 (f. 55), Mm. i. 27 (f. 78). The first and third of these seem to belong to the period before the Statute *Quia Emptores*; the second is a little later. Of the first I may be allowed to say a few words. The book in which it is found belonged to the monks of Luffield Priory, which stood on the border between the counties of Buckingham and Northampton. It purports to be a work composed by one John of Oxford, and we may gather from its contents that John of Oxford became a monk at Luffield. It begins with a short preface touching the desirability of having written evidence of legal transactions—'Cum humana condicio vergat ad decliue et generaliter loquendo proniores sunt homines ad malum natura carnea quam ad bonum,' and ends thus: 'Explicit modus, et ars componendi cartas, cyrographa, conuenciones, obligaciones, testamenta, litteras presentacionum ecclesie, et institucionum, suspencionum, certificacionum, edicionum et literarum dimissoriarum et litterarum pro pecunia patri a[2] scolari destinatarum[3] secundum Johannem de Oxonia et similiter quietarum clamacionum et manumissionum. Explicit expliciat, ludere scriptor eat.' Let us see what forms this ancestor of our Jarmans and Davidsons thought profitable for mankind, and let us not omit to notice any dates that occur:—

1. Charter of feoffment in fee simple 'tenendum de me et heredibus meis.'

2. Alia carta que tangit condiciones utiles emptori. Charter of feoffment 'tenendum dicto J. et heredibus suis vel cuicumque vendere legare vel assignare voluerit.'

3. Charter of feoffment for life.

4. Charter of feoffment in frank almoign.

5. Carta de domo religiosa seculari concessa. Brother J. Master

[1] A paper read at the Cambridge Law Club.

[2] pro pecunia pat'a (MS.).

[3] destinatorum (MS.).

of the Hospital of S. John of Oxford and the brethren of the said place make a feoffment of land in the parish of All Saints, Oxford, to R. F. his heirs and assigns save Jews and any other religious house.

6. Carta de libero maritagio: to the husband and the heirs that he shall have by my daughter whom I have given him to wife, and in case she shall die without an heir *de se*, the land shall return from the husband to me, my heirs or assigns.

7. Carta de dote libera. I have given certain land to my wife by way of dower for her life.

8. Quitclaim to W. et heredibus suis et cuicumque vendere, dare, legare, vel assignare voluerit in perpetuum.

9. Another quitclaim supposed to be made by J. of Oxford.

10. Carta de maritagio. Feoffment of a burgage in municipio Oxonie to hold to husband and wife and their heirs proceeding from the wife. If the wife dies without an heir *de se* I will that the land revert to me my heirs and assigns without any contradiction on the part of the husband.

11. Carta de empcione redditus et servicii.

12. Carta specialis de vendicione terre .... tenendum de me et heredibus meis sibi et heredibus suis et cuicumque et cuilibet dare vel legare vel assignare et quandocunque et ubicumque dimittere voluerit tam in prosperitate quam in egritudine excepto loco religionis et judeissmo.

13. Carta de confirmacione vicarie.

14. Sale of a villain for the purpose of manumission. I have granted and quitclaimed to H. my 'native' R. with his progeny (*sequela*) and all his chattels for ever, for 10 marks of silver.

15. Consequent manumission. H. now manumits R. whom he purchased from A. B., and for further assurance hands over the deed of purchase.

16. Sale and manumission of a villain effected by a single deed. B. grants to W. one R. with his chattels and a virgate of land held by him in servitude in order that W. may manumit R. and make him free, 'so that he with his whole suit and all the things aforesaid may remain a free man, rendering to me and my heirs 10 shillings a year.' For this grant B. has received 10 marks from W.

17. Lease dated 1272. A conventio by which A. demises to W. all his land at Preston with the manor thereto belonging, to hold to him his heirs and assigns for 10 years at a rent of a pair of gloves or 6*d*., W. having given to A. £30 to deliver his land from the Jews. The lessee is to repair.

18. Alius modus cyrographi. Dated 1274. Lease for ten years of land with a manor and farming stock, which is valued;

tenendum to the lessee his heirs and assigns for the said term; rent of ten shillings; £100 paid by lessee to lessor for this lease. The lessee finds pledges for the fulfilment of his obligation. Both parties pledge faith. Instrument executed in duplicate.

19. Cyrographum de acris terre. Dated 1274. Lease of an acre of arable land and half-acre of meadow for ten years. In the parcels the 'aqua que vocatur Charewelle' is mentioned.

20. Cyrographum de burgagio dimisso ad firmam. Dated 1274. Demise of a burgage in the High Street (*magna strata*) and the parish of All Saints, Oxford; tenendum by the lessee his heirs and assigns for twenty years; rent twenty shillings. Lessor is to do the repairs; if the house falls down he will rebuild it; if lessee has to spend money on repairs he may hold the premises until he has been satisfied for his expenditure according to the view and award of good and lawful men.

21. Forma obligacionis de pecunia mutuata. In respect of certain loans and purchases which took place in 1274, I am bound in certain sums to W., 'vel suis certis procuratoribus vel heredibus suis vel executoribus hoc scriptum presens habentibus si de eo, quod absit, humanitus contigerit,' to be paid by certain instalments, under penalty of twenty shillings to be paid to the fabric of the church of S. Mary at Oxford, and of twenty shillings to the said W. the principal creditor, and of the twenty pence 'suo certo nuncio vel procuratori hanc literam defferenti,' for their expenses. I have bound myself to this 'fide media,' and have found sureties A., B., C., who have constituted themselves principal debtors along with me for the said monies. We submit ourselves to the judgment of any court, whether spiritual or civil, chosen by the creditor. We submit to be excommunicated by the bishop or to be distrained in all our movables and immovables by the king's bailiffs; any goods taken in distress may be sold in our absence; the bailiff making the distress may have twenty shillings for his pains; the custodian of the crusaders in such a bishopric for the time being shall have twenty shillings of our goods for the aid of the Holy Land if we make default in payment of any instalment. We renounce the privilege of crusaders and every cavil, more especially the king's prohibition. We grant that the creditor or his proctor shall be believed without making oath.

22. Obligation by the Prior of Luffield and his Convent. We have sold to Alexander le Riche of Brakele all our wool, to be delivered to him or his attorney at the shearing in 1272. If we make default we subject ourselves to the jurisdiction and coercion of the Archdeacon of Northampton or of Buckingham, whichever Alexander may prefer, that he may compel us from day to day by

ecclesiastical censure, until we satisfy Alexander by delivering the wool and paying costs and damages. Dated Luffield, 1st Aug., 1271. Note that two witnesses with the tabellio or notary are enough for a bond; for a chirograph there should be four; for a charter seven or nine, but at any rate an uneven number.

23. Forma obligacionis de ecclesia dimissa ad firmam. Dated 1272. Lease by rector to chaplain of land and tithes in Preston for four years. Lessee submits to ecclesiastical jurisdiction and renounces divers privileges, including royal prohibition.

24. Obligacio denariorum. Short bond. I am bound to R. in sixty shillings to be paid to him or his certain attorney bringing these letters, within a fortnight after 1st Aug., 1274, and I am bound to pay any damages and expenses to which he shall be put.

25. Modus componendi testamentum. Anno gracie 1274 coram domino Willelmo presbitero ecclesie Omnium Sanctorum, A. de B. et B. de C. vicinis meis et coram aliis ibidem existentibus, et hoc audientibus et videntibus, ego J. de N. . . . . condo testamento in hunc mundum [corr. *in hoc modo*]. Various pecuniary legacies to pious uses, to the poor, &c., to marry my daughter, to my servant, for the repair of bridges. All my household utensils to be divided between my heir and my wife. Appointment of A., B., C., D. executors. 'Et ut hoc firmum sit et stabile tam ego quam predicti executores mei scriptum istud sigillorum nostrorum munimine roboravimus.' Schedule of debts owed to and by the testator. (Note that the executors are present when the will is made and seal it.)

26. Alius modus testamenti. I., J. of Oxford, clerk, on Tuesday next, after the feast of S. Edmund A.D. 1274, make my testament. Pecuniary legacies to pious uses, and six marks to my mother. No residuary gift. Reference to the last precedent for the concluding formula.

27. Litera presentacionis ecclesie per patronum episcopo.

28. Presentacio ab episcopo ad decanum. R. bishop of Lincoln in the fifteenth year of his pontificate[1] addresses the Dean of Oxford, directing him to see whether a certain church is vacant.

29. Litera patens institucionis by R. bishop of Lincoln in the fourteenth year of his pontificate.

De episcopo ad decanum pro eodem.

Litera patens de decano pro eodem.

30. Litera certificacionis super ordinibus.

31. Litera citacionis by the Official of the Archdeacon of London. Dated 1271 in the church of S. Mary at Oxford.

[1] Richard of Gravesend was consecrated Bishop of Lincoln in 1258.

32. Litera certificacionis super eodem; testifying that a citation has been made.

33. Litera suspencionis ab ingressu ecclesie.

34. Litera absolucionis.

35. Adam Prior of Luffield and his convent appoint 'our beloved in Christ John of Oxford commonachum nostrum' to be our procurator; giving him large and general powers.

36. Adam Prior of Luffield and his convent appoint their fellow monk, brother John of Oxford, to be their proctor in proceedings before the bishop of Lincoln. Given at Luffield on Tuesday next after the feast of S. Lucy A.D. 1273.

37. Litera procuracionis.

38. Litera edicionis. Ecclesiastical plaint of C. against N.: C. has been transcribing a book for N.; he was to be paid according to the estimate of good men; N. has broken the agreement; C. seeks justice.

39. Precedent for a letter by an Oxford student to his father.

40. Litera warantizacionis. The Master of the Temple announces that R. de F. the bearer of these letters, 'our merchant and tenant,' is travelling for our business and is therefore to be quit of tolls and tallages.

41. Litera acquietacionis. Release for a bailiff who has rendered his accounts.

42. Adam Prior of Luffield and his convent pray Oliver bishop of Lincoln to admit to priest's orders the bearer, namely, Walter of Mursele, deacon.

43. Adam Prior of Luffield excuses himself to the Archdeacon of Buckingham for not attending a synod at Aylesbury.

In its present form the treatise cannot be older than the year 1280, for it mentions Oliver bishop of Lincoln. This must be Oliver Sutton, who was consecrated in that year. The document in which Prior Adam is supposed to appoint John of Oxford proctor for the convent may cause us some little difficulty, for it is dated in 1273, while the only Prior Adam of whom we can hear presided over the monastery from 1279 to 1287[1]. But many of the instruments are supposed to bear a somewhat earlier date, and at any rate I think it clear that the book belongs to the earlier years of Edward I's reign:—the Jews are still in England, and *Quia Emptores* is still in the future.

Now there are a good many points in this book on which at a proper time and place a commentary might be hung. Thus there is the attempt to make freehold land devisable 'per formam doni,'

[1] Monasticon, iv. 346.

that is to say, to give the donee a power of devising it by making the gift to him his heirs and devisees. I am persuaded by Bracton's vacillating language[1], by a precedent that I have found in another collection, and by several actual deeds that I have seen, that this attempt very nearly succeeded, that the power of devise given by the Statutes of Henry VIII and Charles II was very nearly won in the middle of the thirteenth century. Then again when a lease of land is made for a term of years, it is made to the lessee 'his heirs and assigns'; this however will surprise nobody who has looked at the earlier year-books. Then again the manumission by way of sale is very interesting; this also I have seen in another collection. But on the whole the most curious documents are the bonds, the most curious because as yet no one has thought worth while to investigate the mercantile law of this period. The ordinary mercantile bond of the thirteenth century, if the transaction is a big one, is often a very elaborate affair, and in order to understand it we ought to know something of three different systems of law, the English Common law, the medieval Roman law, and the Canon law, for the obligor is made to submit himself to every conceivable jurisdiction English and foreign, temporal and spiritual. He has to renounce all manner of 'exceptiones' given by Roman or given by Canon law, besides renouncing the writ of prohibition and submitting to extra-judicial distraint by the sheriff. Very curious too are the manifold devices by which the sin of usury is evaded, penal stipulations in favour of the relief of the Holy Land, or in favour of the building of Westminster Abbey, and agreements to accept the creditor's unsworn estimate of the 'damages and costs' that he has been put to by being kept out of his money. The conveyancer of Henry III's day ought to have known a little of several kinds of law. When he drew a will he drew a document the validity and interpretation of which would be a matter for the ecclesiastical courts, and when he drew a bond he drew a document which he hoped would hold good by whatever law it might be tested. This leads me to venture a guess: Had Brother John been studying or teaching the art of draftsmanship in the learned city whence (perhaps not until he got to Luffield) he took his name? At Oxford of course Roman and Canon law were being read, and the latter at all events was not studied merely as a scholastic exercise but as a matter of practical importance, a 'bread-and-butter science' if you will. Also it must have been almost necessary for every large monastery to have among its members some one who could readily draw all the documents of common use in the management of large estates and the transaction of

[1] Bract. f. 18 b; 49; 412 b.

mercantile affairs. Some houses were deeply engaged in the wool trade, constantly making elaborate bargains with Lombard merchants; all must have been glad of a brother who at short notice would draw a charter of feoffment, a will, a lease, a mortgage, besides being familiar with those 'briefs, citations, and excommunications' of which our Prayer Book still speaks. People must have been taught these things, and why not at the great seat of learning?

But I am keeping to the last by way of plum the most striking testimony to the connection of this book with University life. I have said that among the precedents there is one for a letter to be written by a student to his father—a letter asking for money, an old, old form of 'common assurance,' perhaps the oldest and the commonest. Once more I place it at the disposal of the studious but impecunious youth, premising that here and elsewhere the scribe of this Cambridge MS. has shown himself to be a careless workman.

Metuendo patri suo domino R. de B.—P. filius suus studens Oxonie pro salute famulatum in omnibus filialem. Precepit mihi vestra paternitas reverenda in discrecione mea ut statum meum et eventus mihi contingentes quam cicius possem vobis propallare. Quare vestre paternitati tremende post deum unico refugio, singulari me[e] miserie fulcimento parens, breviter ad presens significo me in optimo statu tam sanitatis anime quam corporis existere quod de vobis et karissima genitrice mea et domina, sororibus et aliis amicis meis plus corporeis oculis intueri quam audire desidero. Cum autem honestum sit studentis propositum, et artes liberales ejus intencio intendat adipissi [*sic*], pro hoc a patre largius meretur subveniri, unde paternitatem vestram, de qua non modicam reporto fiduciam, dignum duxi deprecandam[1] et ea qua possum devocione attencius supplicandam quatinus mihi vestro indigenti, numismate carenti [*Angl.* in want of coin,] studium exercenti, nihil quid[2] temporale lucranti, consilio et auxilio destituto, nisi vestra mihi solita cicius suspiraverit benivolencia ad erudicionis mee sustentacionem, quod[3] sederit vestro beneplacito[4] conferre dignemini, in presenti facto taliter provisuri ne pro tali defectu scolas relinquere, tempus amittere, domumque redire compellar. Vivite, gaudete semper sine fine valete.

F. W. Maitland.

[1] deprecandum (MS.).
[2] nⁱl q̄ (MS.).
[3] The usual abreviation of *quod*.
[4] beneplacita (MS.).

THE DECLINE OF ROMAN JURISPRUDENCE.

IT is commonly supposed that Roman jurisprudence attained its perfection during the early centuries of the empire; more particularly, however, is it the age when the five jurists expressly referred to in the law of Citations (viz. Gaius, Papinian, Paulus, Ulpian, and Modestinus) flourished, that is to say, the century from about 150–250 A.D., which is considered to be the period of the classical jurisprudence. At the same time it is admitted on all hands, that the last of the above-mentioned jurists, Modestinus (living down to about the middle of the third century; in 244 he was *praefectus vigilum*) closed the series of the classical jurists, and that no jurist of distinction succeeded him. With Modestinus 'obmutuerunt iuris consultorum oracula.' This word of Jacobus Gothofredus (1587–1652) has been repeated again and again down to our own days.

In fact, we are told that a science once so lofty and elevated suddenly collapsed into nothing, or, to use metaphorical language, we are told that the highest soaring was followed by the deepest fall, the bright day suddenly by the dark night without any previous transition, any twilight. And if we inquire into the facts which are to support this theory so contrary to the whole history of intellectual phenomena, there is hardly anything stated except the fact that the writings of several of the jurists who were at work during the earlier part of the third century are extracted in the Digest to a very considerable extent[1], whilst hardly any jurist living during the remainder of the same century is referred to.

This is the theory which has been recently assailed and replaced by a new one by Professor Franz Hofmann of Vienna, in an essay[2] which is equally distinguished by the wide reading and thorough

[1] Half the space of the Digest is taken up by the fragments of Ulpian and Paulus.

[2] It is the first of a series of six essays, published under the title, Kritische Studien im römischen Rechte. Wien, Manz'sche Buchhandlung (228 pp. 8vo.). The other essays, equally valuable both on account of the criticisms and suggestions which they contain, deal with some special questions of the Roman law of Inheritance, and object to views on the subject which are more or less generally recognised. The whole book is dedicated to his friend and colleague, Professor Pfaff of Vienna. Both the professors are the joint editors of the well-known 'Lehrbuch der Pandekten,' by Arndts. See LAW QUARTERLY REVIEW, vol. iii. p. 85 seq.

research of its author, and by its lucid and attractive form of exposition.

According to the contents of this essay it is, in the first place, necessary to put the period which really deserves the name of an epoch of classical jurisprudence at an earlier date than is usually done. In the opinion of Professor Hofmann, Labeo the jurist, who by his unusual general culture and legal learning gave a most powerful impetus in the time of Augustus to the study of nearly all the branches of law, must be considered as the first of the classical jurists. For he united in his person for the first time those qualities which must be taken to be the characteristics of a classical period, combining with the great productive power of the later centuries of the republic a considerable refinement in legal analysis and form of exposition. On the other hand, Julian (under Hadrian) is to be considered the last of the classical jurists. By his comprehensive Digest—90 libri Digestorum.—and his revision of the edictal law—Edictum perpetuum (Hadriani).—he was the forerunner of the later undertakings both of the systematisation and codification of Roman law. Thus the classical period is confined to the first century and a half of our era. It is true that the refinement of analysis and exposition is still visible in the writings of the subsequent jurists, but they do not show the same power in developing new ideas and principles; their works are essentially those of scholars who elaborate the materials handed down to them. The time which hitherto was considered to be the period of the classical jurists (150–250 A.D.) is pronounced by Hofmann to have been the time of the great Epigoni. Only in favour of Papinian an exception is made; by his precise and vivid perception of facts and legal principles, his mastery of theory and familiarity with actual practice, he is declared to resemble the former jurists in contradistinction to his own contemporaries.

In the second place, it is maintained by Professor Hofmann that the decline of Roman jurisprudence was not sudden, but gradual. The jurists have neither disappeared nor have they ceased to work after the time of Modestinus; their work is now contained in an anonymous form, in the rescripts of the Emperors. It is obvious that the 'responsa' of the jurists do not differ in their nature from the 'rescripta' of the Emperors. Both give information as to the law to be applied to the particular facts of a certain case. Moreover, they were—very commonly—composed by the same person. One and the same jurist gave 'responsa' privately in his own name, and drafted, as a member of the privy council, rescripts which afterwards were issued under the name of the Emperor. This competition on the part of the jurists was naturally objectionable

to the growing absolutism of the emperors, and so had gradually to give way to the emperor's sole authority, the 'rescripta' taking the place of the 'responsa.' Whilst there is only a single rescript of Hadrian preserved in the Code of Justinian, their number is pretty frequent in the second half of the same century, and increases enormously in the third century; there are, e.g., no less than 272 rescripts of the short reign of Gordian III (238–244), and as many as 1222 issued by the Emperor Diocletian (284–305). And if we look at these rescripts and compare them with the constitutions of the subsequent Byzantine era, we are struck by the great difference noticeable between the two: the former being short, precise, always to the point in question; the latter long-winded, bombastical, frequently altering the existing state of law in a very arbitrary and inconsiderate manner.

So much in substance on the views of the author. We cannot help thinking that these views are essentially correct. It is true it may be doubted whether such eminent jurists as S. Caecilius Africanus, the famous pupil of Julian, and Q. Cervidius Scaevola, the no less celebrated teacher of Papinian, are really to be included among the Epigoni, or whether the period of the classical jurists is not to be extended down to the time of Papinian (i.e. the end of the second century), but there is no doubt whatever that the writings of Paulus and still more those of Ulpian exhibit a certain want of productive power, and reproduce to a very considerable extent merely the results of their predecessors. It is equally established beyond any doubt, that the decline of the Roman jurisprudence was gradual, the 'responsa' having been replaced by the 'rescripta,' which show both in matter and form that the spirit and vigour of the old jurists had not yet entirely vanished. There is only one point which may give rise to doubts. If the jurists remained anonymous as the authors of the rescripts, they certainly were not prevented from making their name known to posterity by other writings, and yet it is the absence of legal literature which is the characteristic feature of the time. This fact, however, is accounted for by the great change which has come over the ancient world. The universal desire for a creed satisfying the feeling and intellect of man, the deep longing for religious consolation, so strongly noticeable in the second and still more in the third century, force religious and philosophical questions into the foreground of public attention and discussion. It is due to this change in the mind of man, that the theosophical and theological literature soon overshadows that of any other study,—in fact, it becomes the only literature of real importance,—and that theosophers acquire a constantly increasing and at last exclusive influence with the

emperors, who in earlier times acted solely under the advice and guidance of the jurists [1].

Thus we see before our eyes a course of development which is both natural and intelligible. Out of unwieldy beginnings—the age of infancy,—marked by a formal and rigid interpretation and application of the old national law of Rome, the 'ius civile,' the Roman jurisprudence acquires an ever-increasing strength and dexterity in the latter half of the republic—the age of adolescence,—being compelled to master the principles of the growing 'ius gentium' and their antithesis to the precepts of the old civil law. Thus it attains, in the commencement of the empire, the age of full maturity and manhood, the so-called period of the classical jurists, which (as we should modify Professor Hofmann's statement) continued down to the time of Papinian. In his days, however, the decline sets in, lasting throughout the whole of the third century. In this period of the ageing jurisprudence the results of the labours of the classical jurists are on the one hand fully expounded in the extensive commentaries of Paulus and Ulpian, which, by their clear, lucid, and intelligible form of exposition were exceedingly well fitted to be appreciated by the later times, whilst on the other hand the practical application of law is still in touch with the old Roman jurisprudence. The last period, however, from Constantine down to Justinian, is a period of senile weakness. It does not produce anything which would show that the old traditions were still at work. Hardly able to cope with the principles underlying the vast mass of the written law, the authorities of this period aimed chiefly at providing directions and collections to assist the practical lawyer in the application of law: endeavours which were at last brought to a conclusion by the Emperor Justinian, in his codification both of the juristical law (the Digest) and the law laid down in the Imperial constitutions (the Codex).

ERWIN GRUEBER.

[1] See the very interesting and far-seeing remarks in the Kritische Studien, pp. 30–35.

OUGHT BILLS OF SALE TO BE ABOLISHED?

THE object of this paper is not to review the Bills of Sale Acts or the decisions upon them, but to show that the practice of granting Bills of Sale is prejudicial to the true interest of the mercantile community, and that they should be utterly prohibited.

The subject may be regarded from several points of view. Among others, as affecting the creditors of the grantor, the person who advances money upon security of Bills of Sale, the grantor himself, and the grantor's landlord, if any. The expression Bill of Sale may be shortly taken as meaning for the present purpose, 'Any act or acts in the law by which an owner of personal chattels transfers the property in those chattels to any other person by way either of security for money advanced or for any other valuable consideration, or by way of voluntary settlement, but so that the owner nevertheless retains the possession of those personal chattels.' The above definition is wider than that contained in Section 4 of the Bills of Sale Act, 1878, inasmuch as it would cover the now common transaction of sale, followed by the hiring of the goods by the purchaser to the vendor, to which the operation of the Bills of Sale Acts has been frequently and successfully evaded. (See, for instance, *North Central Waggon Co.* v. *Manchester, Sheffield and Lincolnshire Railway Company*, 35 Ch. D. 191.)

As Lord Justice Bowen clearly pointed out in the case just cited, 'This Act (viz. the Act of 1882), like all the preceding Bills of Sale Acts, does not avoid transactions; it does not avoid parol agreements; it does not avoid anything except documents,' as defined by the Act of 1878.

The principal objections to Bills of Sale (using the term as above defined) are that, where validly created, they permit the grantor to obtain fictitious credit, and they withdraw the chattels which are the subject of them from liability to be seized in execution at the suit of his creditors, or otherwise render them not available for payment of his debts.

Let us first look at this subject from the point of view of the creditors of the grantor.

Now I apprehend that the creditors of the grantor are by far the most numerous class of persons interested in the matter of the Bill of Sale granted by their debtor, and I think everybody will agree that they constitute in almost every case a meritorious class, and

that they are deserving of all the protection which the law can reasonably afford to them.

The only protection which the law provides in the interest of creditors is to require that notoriety shall be given to the transaction by means of compulsory registration, but as the existing statutes do not apply to the case of sale and reletting above referred to, they do not even extend this limited protection so far as the exigency of the case requires.

The first point therefore for us to consider is, Whether registration is any real protection to the mercantile community? It has always appeared to me that no system of registration which could be devised would be a complete protection, and that for many reasons.

The creditors of the grantor may be divided into two classes—those who became creditors before the date of the Bill of Sale, and those who did not become creditors until afterwards. As to the former—i.e. the creditors who were such at the date of the Bill of Sale—of what benefit is registration to them? Assuming that the fact that their debtor has given a Bill of Sale reaches their ears, it merely affords them the disagreeable information that he has swept out of their reach what is in nineteen cases out of twenty the only fund which they regarded as their security, and upon the credit of which they allowed the debt to be incurred. It is notorious that no one ever dreams of giving a Bill of Sale except under great pressure of circumstances, and in almost every case the grantor at once pays away the consideration money to satisfy some one or two pressing demands, leaving himself with practically no assets to meet the claims of the general body of his creditors. As to creditors who become such after the date of the registration of the Bill of Sale, the case stands somewhat differently, but even as regards them registration is of little value.

As most traders nowadays who have any dealings with persons at a distance from their places of business, or little known to them, read Kemp's Mercantile Gazette or Stubbs' Weekly Gazette, or some other trade protection journal of a similar nature, I will assume, for the purposes of argument, that every commercial man and tradesman informs himself of the names of grantors of Bills of Sale (though of course the assumption is by no means universally true).

At most registration is only useful to such creditors so far as it draws their attention to the financial position of persons already known to them. Can commercial men be expected to keep a complete register of Bills of Sale, and search it diligently for a period of five years, in order to see whether they can safely execute an

order received by them from a person who has not had any previous business transaction with them? To expect them to do anything of the kind would be simply absurd. Such a system would entail such heavy expense upon the trader that it is practically impossible. The only persons to whom registration affords protection are persons to whom the grantor is known, and who may be thereby prevented from giving him credit. In days gone by, when the circumstances of life practically compelled a man to purchase goods from a more limited number of people, registration may have been of some slight value. Now however, in these days of keen trade competition, nothing is easier than for a man, whose financial position is known to those persons with whom he has formerly dealt, to send his orders elsewhere to traders carrying on business at a distance, and this indeed is the course which is very frequently adopted.

I need not dwell at any length upon the legal remedies open to creditors whose debtor has given a Bill of Sale. The usual course is for the creditor to place his account in the hands of his solicitor, who goes to the expense of taking a copy of the Bill of Sale in the hope of discovering some wretched technicality by which his client can upset the Bill of Sale. If he can succeed in doing so, the client will probably seize the chattels comprised in the Bill of Sale, and run the risk of contesting the validity of the Bill of Sale upon an interpleader issue. If no technical flaw should be found, or the creditor does not care to embark upon litigation, his remedy may depend upon whether or not he is a creditor for £50 or upwards. If he is, he may take bankruptcy proceedings. In this case, after expending probably £20 to £30 in costs, he may find that the debtor has no assets except his equity of redemption (if any) under the Bill of Sale, which is usually found to be of very little value.

If he is a creditor for a less amount than £50 his only remedy in most cases is to sue his debtor to judgment, and proceed to squeeze the amount due out of him by small instalments by means of a 'judgment summons,' under the Debtors Act, 1869, a proceeding the most tedious and unsatisfactory that can well be imagined.

Thus we find Bills of Sale in almost every instance either absolutely depriving creditors of all remedy, or rendering it extremely troublesome to obtain payment.

It has long been recognised that it is upon the faith of the personal chattels by which a man is surrounded that traders give their debtors credit. (I need scarcely refer to the well-known case of *Horn* v. *Baker* (Smith's Leading Cases) as an authority upon this question, which is there exhaustively dealt with in the arguments.) It is obvious why this is so. The fact that a man is in occupation

of land, or of a house, or that he is the ostensible owner thereof, shows nothing as to his credit. He may be merely a lessee at a rack rent, or he may only have a limited interest, or he may be merely a trustee, or the property may be mortgaged to its full value. All these possibilities are so well understood that no one thinks of giving credit to a man because he appears to be the owner of land or house property. But the case as to personal chattels stands very differently.

According to the normal state of things a creditor is fairly justified in assuming that the style in which a man lives is some indication of his financial position. He is justly entitled to assume that the furniture in the debtor's house and the horses and carriages and other personal effects by which he is surrounded, belong to him and to him alone.

The reputed ownership clause of the Bankruptcy Act, 1883, is framed upon this assumption. Why, however, should that clause be confined to chattels in the possession of the bankrupt 'in his trade or business?' Does not the possession of personal chattels of the bankrupt *not* in his trade or business operate to induce credit equally with chattels in his trade or business? What sensible distinction can be drawn between the two classes of goods? The distinction might have been intelligible in the days when the Bankruptcy Acts applied only to 'traders.' Now, however, that the Act applies to non-traders, there would seem to be no good reason for limiting the operation of the reputed ownership clause to goods in the possession of the bankrupt 'in his trade or business.'

Moreover the reputed ownership clause is not always effectual as to the goods to which it applies simply because it only applies to such goods if in the 'possession order or disposition of the bankrupt by the consent and permission of the true owner' *at the commencement of the bankruptcy*. The consequence of this is that if the Bill of Sale holder is sharp enough to take the goods out of the 'possession order or disposition' of the bankrupt before the commission of the act of bankruptcy upon which his debtor may be afterwards adjudged bankrupt, he can withdraw the chattels comprised in his security from the operation of the Act.

Next as to Bills of Sale as affecting the grantee. Theoretically of course it is open to anyone to advance money upon the security of a Bill of Sale. In practice, however, Bills of Sale are taken principally by two classes of persons. By far the larger number of Bills of Sale, as everybody knows, are given to professional moneylenders, who in consideration of the security which they obtain rest satisfied with interest at the rate of 60 per cent. only instead of the

100 or 150 per cent. which they usually demand upon unsecured loans.

The other persons who take Bills of Sale are usually creditors to whom the grantor is already indebted, and who make a relatively small further advance in order to obtain a *tabula in naufragio*. By making such an advance they seek to elude the doctrine of fraudulent preference.

Is either of the above classes of persons deserving of protection at the expense of *bona fide* traders?

Bills of Sale have absolutely nothing to be said for them as being advantageous to the grantors.

Probably in isolated cases the grantor may by borrowing money upon the security of a Bill of Sale tide over a time of depression, but such cases are rare.

The unfortunate man who has been beguiled by the professional money-lender or other person to take up money upon a Bill of Sale, finds that immediately upon registration his credit amongst all persons to whom he is known is utterly wrecked. Creditors dun him for payment of their accounts. He is harassed by summonses seeking his commitment to prison, his landlord will thenceforth grant him no time for payment of his rent, but looks upon him as an undesirable tenant to be got rid of at the earliest convenient opportunity. Probably his larger creditors take proceedings with a view to make him a bankrupt, and in nineteen cases out of twenty he finds himself sooner or later in the hands of the official receiver with little or nothing to meet his creditors with, having parted with his only tangible assets for the sake of deferring for a short period the inevitable catastrophe of bankruptcy.

Can anyone say that the system of giving and taking Bills of Sale is upon the whole advantageous to persons in distressed circumstances?

A few words now as to the landlord of the grantor. Is he in any way injuriously affected? It is perfectly true that the Bill of Sale is no bar to the landlord's right of distress so long as the chattels comprised therein are allowed to remain upon the demised premises. But what is the position of the landlord if the grantee has seized the chattels and removed them from the premises? Clearly the landlord cannot follow and distrain them even if they are removed by the grantee after the rent has become due, and even if they are so removed with intent to avoid a distress, inasmuch as the Statute relating to fraudulent removal has no application to such a case. Still less has the landlord any remedy if the goods are removed before rent becomes due.

As a consequence of this I have not unfrequently seen inserted in

leases a power of re-entry upon the lessee granting a Bill of Sale of his goods, and I have more than once myself inserted a similar clause.

Can anyone say then that Bills of Sale do not operate to the prejudice of landlords?

Why in the face of all these things should Bills of Sale be retained? For my own part I cannot help thinking that every reason exists for their abolition. One occasionally hears it said, 'If goods belong to a man, why should he not be at liberty to mortgage them as well as sell them in the same manner as he can deal with land?' The answer is that personal chattels (with comparatively very rare exceptions)[1] stand upon a different footing to real estate. Not only for the reasons above given, but because a man, compelled to part out and out with freehold property, may never have an opportunity, should his circumstances improve, of repurchasing it, notwithstanding that the ownership or possession of the particular house or land may be esteemed by him of the highest consequence. Whereas he can nearly always go into the market and buy chattels as serviceable to him in all respects as those with which, in the days of adversity, he was compelled to part.

J. B. Matthews.

[1] It is unnecessary to take into account here the limited classes of chattels which are as difficult to replace as a house or estate, e.g. original works of art and rare books. Such is not the staple of Bills of Sale.

THE NATURALIZATION ACT, 1870, s. 7.

IN Mr. McIlwraith's article on The Bourgoise Case in London and Paris[1], he states that it was argued for the French relations before Mr. Justice Kay that 'section 7 of the Naturalization Act, 1870, only grants to naturalized aliens the rights of a British subject while in the United Kingdom. The moment, therefore, that Bourgoise quitted the United Kingdom his naturalization evaporated, as it were, into thin air, and his nationality of origin revived.' Dealing subsequently with this argument, he says, 'Now this section, as it stands, appears to be nonsense. We are told that an alien shall enjoy certain rights, privileges, &c. in the United Kingdom, with this qualification, that when out of the United Kingdom he shall not enjoy them in a given hypothesis. If the words "in the United Kingdom" are to be taken literally, then the pretended qualification qualifies nothing, and is wholly and entirely superfluous. For what is the use of saying that the naturalized alien shall not, under certain circumstances, enjoy his rights out of the United Kingdom, if the certificate only grants him rights at all so long as he remains in the United Kingdom? Possibly the words "in the United Kingdom" are intended to refer to the political rights which the naturalized alien could not of course exercise when abroad. But the more probable explanation appears to be that the framers of the Act meant to embody the practice in vogue under the former statute, without noticing that the adoption of the "qualification" rendered these words a contradiction in terms.'

Now, as Mr. Justice Kay decided the case without calling upon the counsel for the French relations, the arguments urged on their behalf must be sought in the reasoning of the learned judge himself. If correctly reported, he did remark in the course of the hearing that the certificate granted to Bourgoise 'effects a naturalization so long only as he resides in this country.' The context shows, however, that he was referring to the qualifying provision, and fell into the slight inaccuracy of treating residence in the United Kingdom as the only alternative to residence in France. This inaccuracy is corrected in the judgment, where it is laid down that the certificate 'amounts to a certificate of naturalization so long,

[1] LAW QUARTERLY REVIEW, vi. p. 379.

and so long only, as the subject of it does not reside in his original country, France.' The alleged argument, therefore, cannot properly be attributed to Mr. Justice Kay.

I submit, further, that Mr. M'Ilwraith's criticism, above quoted, of the language of s. 7 is not well founded. The clause in question, omitting the qualifying part, runs thus:—

'An alien to whom a certificate of naturalization is granted shall, in the United Kingdom, be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom.'

These words, if they stood alone, might be read as making the effect of the certificate depend on the presence of its holder within the United Kingdom. But it is at least equally in accordance even with their literal meaning to read them as limiting the sphere of his naturalization to one part of the Queen's dominions, and leaving him, so far as other parts are concerned, with all the incapacities of an alien[1]. That the latter is the true construction is apparent from the qualification which follows, that 'when within the limits of the foreign State' of which he was previously a subject, the naturalized alien is not to be deemed a British subject except in particular circumstances. For preference should surely be given to a construction which not only makes the whole clause consistent and intelligible, but also accounts for the adoption of different forms of expression in its two branches. To treat the words 'in the United Kingdom' in the context where they occur as equivalent to 'when within the limits of the United Kingdom,' is going out of the way to impute nonsense to the Legislature.

In confirmation of this view, it may be pointed out that the Act previously in force for granting naturalization by certificate (7 & 8 Vict. c. 66) was not in terms limited to the United Kingdom, and that doubts arose whether it extended to the Queen's colonies and possessions abroad. It had consequently been found necessary to declare by statute (10 & 11 Vict. c. 83, s. 3) that such extension was not intended. This statute is repealed by the Act of 1870. Its other provisions, empowering the colonial legislatures to make laws for granting naturalization within the districts subject to their authority, are re-enacted in s. 16 of the repealing Act; and the effect of s. 3 was, I submit, re-enacted as applicable to the new law by the insertion of the words 'in the United Kingdom' in the clause under discussion.

The suggestion that the framers of the Act of 1870 meant to

[1] Compare the proviso in s. 2 subs. 1, that that section 'shall not confer any right on an alien to hold real property situate out of the United Kingdom.'

embody the practice in vogue under the former statute, by making the certificate ineffectual for all purposes as soon as its holder leaves the United Kingdom, is inadmissible. In the first place, the practice had not been so strict; residence abroad for less than six months had been permitted, and passports valid for six months had been commonly granted for use on foreign travel. Secondly, the Naturalization Commissioners had reported in favour of the removal of the restriction which was in fact imposed. Lord Hatherley quoted and adopted their recommendation on this point when introducing the bill in the House of Lords; and it is evident that both he and Lord Westbury, who took part in the debate, thought that the desired change had been made by s. 7 [1].

There is a question upon this same clause which does not seem yet to have been noticed, but may some day require to be dealt with. Mr. Barclay [2] and Mr. M'Ilwraith have argued with much force, that the naturalization granted by the Act is intended to be as absolute as this country can make it without infringing the rights of other States. They conclude, therefore, that the qualification does not apply where the alien naturalized can by the laws of his own country divest himself of his prior nationality. So far no difficulty arises upon the language of the section. But what is the effect of the qualification where it does apply? Taken literally, it deprives the holder of a certificate of all its benefits whenever, and for so long as, he visits his native country. The loss of status is not, as under the previous Act, the result of a prolonged residence abroad; his rights are suspended the moment he enters the limits of a particular State—though he be merely passing through on his way elsewhere—to revive the moment he re-crosses its frontier. In these days, when foreign travel is so easy and so general, grave inconvenience may be occasioned if the enactment is to be interpreted thus strictly. Take the case of a permanent resident in England, who spends a few days of the summer in the land of his birth. He may be an owner of a British ship, whose quality as such is lost by her becoming the property in whole or in part of an alien. He may possess a qualification for the franchise as a Parliamentary or county elector or a burgess; but, if his stay abroad includes the 31st of July, he will not be entitled to be registered. Again, if a member of a county or borough council, he will, I presume, become disqualified and liable to *quo warranto* proceedings, and should he, in ignorance of his position, continue to act after his return, may incur serious penalties. Other illus-

[1] S. 6 of the bill as originally drawn. See Hansard, 3rd March, 1870, cxcix, 1125, 1135.

[2] Law Quarterly Review, vol. iv. p. 226.

trations might be given of hardships needlessly inflicted if the object aimed at be merely, as it can hardly be doubted that it is, to avoid conflicts of jurisdiction. It is to be hoped that it will be found within the powers of the Courts to give a reasonable interpretation to the qualifying words, so as to make them read as providing, in effect, that the naturalized alien shall not, when within the limits of the State whose subject he was and still remains, be deemed to be a British subject *in any sense derogatory to the rights of that State*. Even so interpreted, though not mischievous, they are probably superfluous, for they only express, and that imperfectly, a qualification which, there is at least good ground to contend, would have been implied without them, and which certainly in practice has been treated as implied, when not expressed, in similar enactments.

LIONEL LANCELOT SHADWELL.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Confirmation of Executors in Scotland. By JAMES C. CURRIE. Second Edition. 1890. Edinburgh: W. Green & Sons. 8vo. xii and 372 pp.

'CONFIRMATION' of an executor is, in Scotland, the name for the judicial grant or act and warrant, by which the personal representative (whether executor or administrator according to English law) becomes legally vested with the right to, and the power to recover, the personal estate of the deceased. Confirmation does not include 'probate' in the sense of establishing the tenor of the testamentary writings, except so far as is necessary to show who is the person entitled to the grant. The jurisdiction to grant confirmation was formerly vested in the Commissary Courts constituted by Royal authority after the Reformation, in lieu of the ancient ecclesiastical courts; the name 'Commissary' being retained to mark the continuance of the functions formerly exercised by the commissaries of the bishops. The areas of jurisdiction of the Commissary Courts long remained coincident with that of the old bishoprics; but in 1823 these courts were reconstituted upon a principle of local division coincident with the counties or sheriffdoms, and with the sheriff acting as commissary in each. Finally, in 1876, the functions of the Commissary were merged in the general jurisdiction of the sheriff—the seal of office and the term 'commissariat' being alone retained as traces of the old jurisdiction. The latter term is still significant to mark the separate divisions of the records relating to this class of proceedings.

Mr. Currie's book, after a brief statement of the history of the jurisdiction, proceeds to deal in detail with the various topics with which the sheriff in his jurisdiction as successor to the old commissary has to deal. As in Scotland domicile determines the court in which application ought to be made, the subject of domicile is first dealt with. Then follows a chapter upon the essentials of due execution of a testament. Then follow chapters (V to X) dealing with the various stages of procedure relating to a confirmation. Chapter XI describes the records. Chapter XII relates to judicial proceedings, i. e. proceedings not merely of routine, and which require the decision of the judge. Lastly, there is a chapter on inventory and estate duty. The whole subject is dealt with satisfactorily, and from a practical point of view. R. C.

The Sale of Goods, including the Factors Act, 1889. By HIS HONOUR JUDGE CHALMERS. London: W. Clowes & Sons, Lim. 1890. 8vo. xxix and 170 pp.

SINCE we briefly referred to this work six months ago we have had further opportunities of examining and testing it, and can only repeat our previous

commendation. The work of codifying the English law is proceeding slowly; Mr. Chalmers himself has embodied the Law Merchant on Bills of Exchange and other negotiable instruments in a statutory form; and last session of Parliament saw a similar success in codifying the Law of Partnership. An attempt to codify the Law of Arbitration only succeeded so far as the statutory side of that law was concerned, and under the auspices of the Society of Authors an attempt is about to be made to introduce order into the chaos of copyright legislation. The work before us represents an endeavour, with the assistance of Lord Herschel and Lord Bramwell, to add another codifying statute to the list, embodying the Law of Sale: but whether that attempt be successful or not, the book will be of use as a valuable text-book of that law, and a concise statement of the principles underlying it.

To the execution of the work we can give almost unqualified praise. Here or there slight roughnesses of language are observable, as in the commencement of the second section which does not read so clearly as we have learnt to expect in the author's work. And we are a little puzzled by the reference at p. 42 to *Bentley* v. *Vilmont* (12 App. Ca. at pp. 476, 479), where, speaking of the restitution of stolen goods to the true owners on the conviction of the thief, Mr. Chalmers says:—'the operation of the rule, when goods have been obtained by false pretences, but under a *de facto* contract, is anomalous, and was rejected by the Lords in *Bentley* v. *Vilmont*.' We were under the impression that the Lords enforced the rule, though unwillingly, instead of rejecting it, and we can only conjecture that 'reject' is a slip for 'regret.' The inevitable second edition will, we trust, soon give an opportunity for the correction of this and one or two other small slips of which no doubt the author is already disagreeably aware.

No doubt a codifying bill must not throw over previous authorities, but we regret that Mr. Chalmers proposes to continue the confused use of the word 'warranty.' Sir William Anson has pointed out at least six various meanings which that much-abused word bears in the authorities, and we should like to make it a misdemeanour to use the word in any future case. Mr. Chalmers proposes to use it [§ 61] as 'an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract.' He, however, admits that implied conditions precedent are always called 'implied warranties,' though on his definition they are not warranties at all. In other contracts than that of sale the term 'warranty' is identified with those terms of the contract which are conditions precedent, such as the warranties in marine policies, and in the contract of affreightment; and we cannot help thinking that a statutory recognition of this as the primary meaning of the word warranty would simplify matters in the future very considerably.

Mr. Chalmers would be the first to acknowledge his indebtedness to the classical works of Blackburn and Benjamin on the subject he treats of, but his work is a distinct and valuable addition to legal literature on the subject, with a value out of all proportion to its size. We hope that in the second edition, whether of the bill, or the Act of Parliament, the author will add short summaries of the leading cases on which his propositions are founded, as illustrations to the clauses of his draft, and thus place this work on the same footing as the most useful book on negotiable instruments for which he is responsible.

Græco-Roman Institutions. By Emil Reich, D.J. Oxford: Parker & Co. 1890. 8vo. 95 pp.

These four lectures are sufficiently brilliant to deserve to have been delivered, as Dr. Reich appears to have supposed they were, 'before the University of Oxford,' and so correct, fluent and idiomatic is their English that one is filled with admiration of the mastery over our language which their author has acquired. Their purpose or tendency is stated in the Preface to be 'to disprove the applicableness of Darwinian concepts to the solution of sociological problems.' Each of them is remarkable for originality of thought and suggestion, but probably the most valuable is the last, which deals with the influence of the 'Classical City-State' on Slavery, the Position of Women, Private Life, Religion, the Downfall of the Roman Empire, and the Development of Christianity. The first and second lectures, in which the author discusses the 'vera causa' of Roman law, appear to us to be fantastic beyond measure. No doubt the question why the Romans alone, of all nations of antiquity, worked out so complete and admirable a system of pure Private law is one which demands an answer. Dr. Reich's answer, in his own words, is this (p. 21): 'The main cause of the rise of Roman Private law and its high perfection I take to be the Roman institution of Infamia.' Infamia, according to him, accounts for almost everything; *inter alia*, for the praetorian legislation, for the persistence of 'patria potestas,' and for the strange 'dichotomy' of Roman law which other writers have attributed to other causes. Those who desire to know how the author makes out his case must read his lectures. For ourselves, we can only say that the evidence which he adduces appears to us entirely insufficient: and indeed so long as he considers it consistent with sound reasoning to identify something 'tantamount' to an assumed cause with that cause itself (as on p. 39) we doubt whether he is likely to disprove the theories of such men as Coulanges and Ihering, whom he criticises in so airy a fashion.

Key and Elphinstone's Compendium of Precedents in Conveyancing. Third Edition. By Thomas Key, assisted by C. Herbert Brown and Alfred Hull Dennis. London: Sweet and Maxwell. 1890. 2 vols. 8vo. lxxvi and 1021 and lxxii and 1008 pp.

Concise Precedents in Conveyancing. By M. G. Davidson. Fifteenth Edition. London: Sweet and Maxwell. 1890. 8vo. xxxii and 839 pp.

The reappearance of fresh editions of these two well-known works shows that they are both still appreciated by the profession. 'Key and Elphinstone' consult the everyday wants of a working conveyancer. They provide a large variety of forms, the excellence of which is well known; but recondite precedents adapted to exceptional cases naturally do not receive so much attention. We rather wondered at not finding a form of mortgage of a public-house, while space is found for deeds less frequently required. The collection of mortgage precedents is, however, large; as indeed it should be in order to be of much service to the practitioner.

It cannot be wondered at if the 'Little Davidson' insists on growing. This book is, as we stated in our notice of the 14th edition, the best book to put into the hands of the student who has mastered his Joshua Williams. It

will enable him to see how the law of real property, of which he has been reading, works in practice. But why does the author insert in a work of this very elementary character a precedent for a stock mortgage?

An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery (Yorke Prize Essay, 1889). By D. M. Kerly. Cambridge: University Press, 1890. 8vo. xiv and 303 pp.

Mr. Kerly has written a very creditable and readable essay, and any one who wishes to obtain a preliminary view of the history of Equity before grappling with severer books might do much worse than take him for a guide. If we have been a little disappointed by his book that is hardly his fault; nor do we say that any blame lies upon his examiners. Still we must confess to having hoped that a Yorke Essay would supply us not merely with a careful statement of things generally known among lawyers, but also with some new materials. For the early history of English Equity unprinted materials exist in great abundance, and we cannot but think that Mr. Kerly would have deserved yet better of his University had he told us something about these instead of paying heed only to printed books. Ever since Mr. Justice Holmes published in these pages his startling theory of 'Early English Equity' we have been waiting for some one to take up the challenge, to tell us, for example, whether the feoffee to uses really is a German 'Salmann' or no. Ten pages on this question would have been worth three hundred on more familiar topics. But then would they have obtained the prize? That we cannot say.

We have also received—

The Elements of Jurisprudence. By Thomas Erskine Holland, D.C.L. Fifth edition. Oxford: Clarendon Press. 1890. 8vo. xix and 390 pp. (10*s.* 6*d.*)—In this edition the pages on Possession have been rewritten, with reference chiefly to Ihering's recent work; there is a new and interesting note on the peculiarly English character of the remedy of Specific Performance (the modern German practice, which, we are informed, is even more liberal than English equity jurisdiction, is, however, not mentioned); recent additions to the science of legislation, such as the Italian Penal Code and the draft German Civil Code, are taken into account; and there is a great deal of careful revision throughout. We may suggest a few improvements for the sixth edition which, if the future resembles the past, can be only about three years off. The treatment of Negligence is already much the better for the relegation of Austin's ponderous blunders to a note. It would be made better still by taking Alderson's classical definition into the text. Copyright would bear fuller treatment, considering the growing international importance of the subject, and also that 'copyright at common law' is one of the few points of general jurisprudence or *Naturrecht* that have been fully discussed on first principles in English courts and in modern times. Mr. Holland does refer to the cases, including *Jefferys* (not *Jeffries*) v. *Boosey*, 4 H. L. C. 815, where the whole controversy was reviewed by the judges and the House of Lords as lately as 1854; but it hardly awakens adequate interest in the beginner to tell him in a foot-note that there is a 'curious question.' A few minor slips in references not posted up, and so

forth, are inevitable in a work so much condensed. Thus 28 & 29 Vict. c. 86 (repealed and superseded by the Partnership Act, 1890) is quoted as subsisting. An index of the references to foreign codes would increase the value of the book to advanced workers.

The Law of Copyright. By THOMAS EDWARD SCRUTTON. Second edition. London: Wm. Clowes & Sons, Limited. 8vo. xx and 284 pp. (12*s.* 6*d.*)—This is a recast rather than a re-edited book, the law of International Copyright having been materially altered by the Bern Convention and its consequences. We think it is not only the latest, but the most useful and practical book on copyright, taken all round. To one statement in the preface we must except, namely, that the codification of copyright law 'appears in 1890 as far off as it was at the publication in 1883 of the first edition of this work.' A bill mainly founded on the recommendations of the Copyright Commission, and prepared by the Society of Authors, has been brought into the House of Lords by Lord Monkswell and read a first time. We hope that before long the passing of this bill may call for a supplement to Mr. Scrutton's book, if not a third edition.

The Law of Musical and Dramatic Copyright. By EDWARD CUTLER, Q.C., T. EUSTACE SMITH, and F. E. WEATHERLY. 1890. London: Cassell & Co. Lim. 8vo. iv and 163 pp.—This is a handy and well thought out manual upon the subject treated. The topics are arranged in a convenient order and handled in a manner free from unnecessary technicality. The persons concerned with musical and dramatic copyright, and particularly in what relates to international copyright, will find what they require expressed in clear and well-chosen language. At the same time the lawyer will find a sufficient statement of the law, with due reference to the cases, and sections of the Acts. The Appendix, which consists only of the Act of 1886 as to international copyright, with the relative conventions and Orders in Council, is limited to moderate dimensions.

Principles of Mercantile Law. By RICHARD VARY CAMPBELL. Second edition. 1890. Edinburgh: W. Green & Sons. xii and 311 pp.—This volume arises out of the reduction into print of a course of lectures delivered for the Institute of Bankers in Scotland. Following the order inaugurated by the great example of Professor Bell, the author commences with the law of bankruptcy. This is followed by 'cautionary (i. e. surety) obligations,' 'security over moveables,' 'principal and agent,' 'partnership,' and 'the Companies Acts.' For the class to whom these lectures were delivered—doubtless consisting mainly of clerks and apprentices to banks—they contain a useful and sufficient summary of the law upon these matters. Looking at the chapter on 'securities over moveables,' an English lawyer may congratulate the author on being exempted from the necessity of dealing with the English Bills of Sales Acts, with their infinite perplexities. The Scotch law proceeds on the intelligible, and apparently wholesome, principle, that a *right in security cannot be created over a moveable without possession.* Shall we ever be able to cut the knot in such a simple way in England?

R. C.

The Statutes of Practical Utility, etc. . . . 53 & 54 Vict. (1890) . . . by J. M. LELY. Vol. II. part VI. London: Sweet & Maxwell, Limited; Stevens & Sons, Limited. 1890. Lg. 8vo. 849—1265 pp.—At p. 948, on the Intestates' Estates Act, we find the following somewhat startling proposition in a note: 'If a woman dies leaving a widower but no issue, the widower

takes over the land for his life only.' Assuming the remark to be tacitly limited to land of socage tenure, we are not aware that any statute has yet dispensed with the birth of inheritable issue as a necessary condition of the surviving husband's title as tenant by the curtesy. The learned annotator, who often and justly censures the language of the Legislature, must have had his accuracy corrupted by keeping so much company with Acts of Parliament.

The Public Health Acts Amendment Act, 1890. With introduction, notes, and references to cases. By BOVILL SMITH. London: Stevens & Sons, Limited. 1891. 8vo. xvi and 202 pp.—This little book has, according to the preface, a twofold object: 'in the first place, to afford to those persons who are interested in the Public Health and Sanitary Law a convenient and ready insight into the most recent legislation upon the subject; .... and, in the second place, to provide a compendious manual for the use of sanitary authorities and practitioners in those parts of the country where the statutes, the reports .... and the larger text-books .... are not easily accessible.'

The Contract of Marine Insurance. Second edition. By CHARLES MCARTHUR. London: Stevens & Sons, Lim. 1890. 8vo. xxvi and 432 pp.—The first edition of this book was fully noticed in the LAW QUARTERLY REVIEW, ii. 263. The author, in the preface to this edition, says, 'In bringing the work up to date, I have taken the opportunity to revise and considerably extend the original text. The authorities have been re-examined and more fully cited; and to avoid a multiplicity of references to reports, the date of each decision has been appended to the name of the case. A new chapter has also been introduced, treating upon the subject of Mutual Insurance Contracts.'

The Stamp Duties on Sea Insurances. By ERNEST KING ALLEN (Royal Exchange Assurance). London: C. & E. Layton, 56, Farringdon Street, E.C. 1890. 139 pp.—'To those who are called upon from time to time to determine the appropriate stamp duty upon sea insurances, the scattered nature of the legislation in regard thereto must have been long apparent,' commences the preface to this little book. Fortunately the agreement of the profession has relieved counsel from the invidious duty of taking stamp-objections, and the intricate task of discovering when objections can be taken. Mr. Allen's book appears to be a clear and correct statement of the law and practice on the subject, and can be recommended to those who have to deal with marine policies.

Lectures on the Growth of Criminal Law in Ancient Communities. By RICHARD R. CHERRY. London: Macmillan & Co. 1890. 8vo. xi and 123 pp.—So far as we have had time to examine these Dublin lectures, they are a sound and careful piece of work in a branch of comparative law not yet adequately treated by any English writer. They would perhaps have been the better for expansion. But the fault, if any, is on the right side.

Deutsche Zeitschrift für Geschichtswissenschaft. Herausg. von L. QUIDDE. 3. Band, 1. Heft. Freiburg i. B. 1890.—The principal contents of this review are rather historical than legal, as the title imports. In this number, however, under the heading 'Neuere Literatur zur Geschichte Englands im Mittelalter,' Dr. Liebermann contributes a critical review of everything published in the last few years that can throw light on English history and institutions, including law and legal studies, down to the accession of Edward I. It appears that this will continue to be a special

feature of the Review, which we accordingly commend to English students of the historical sciences.

Studies National and International, being occasional lectures delivered in the University of Edinburgh, 1864–1889. By JAMES LORIMER. With Biographical Notices by R. FLINT and G. ROLIN-JAEQUEMYNS. Edinburgh: W. Green & Sons. 1890. 8vo. xix and 281 pp.—It was right to make this posthumous collection, and there is much interesting matter in it. But it would not be right to take this occasion to discuss the author's views on the philosophy and science of law, which were more fully expressed in work published and revised by himself.

Civil Government in the United States considered with some reference to its origins. By JOHN FISKE. London: Macmillan & Co. 1890. 8vo. xxx and 360 pp.—A manual of local, State, and Federal institutions in the United States, which, for the very reason that it is elementary, will probably be welcome to many English readers.

The Supreme Court of the United States; its History and Influence in our Constitutional System. By WESTEL W. WILLOUGHBY. Baltimore: The Johns Hopkins Press. 1890. 8vo. 124 pp.—This is more of a book for constitutional lawyers, as distinct from students of political history, than Mr. Fiske's, but its method is historical. Mr. Willoughby gives a useful little key to the mode of citing the U. S. Supreme Court Reports. When will people here (and especially in the Lincoln's Inn library) learn that since 1875 the proper reference has been by consecutive numbers and not by the reporter's name, and that the reports ought to be catalogued and arranged accordingly?

The Annual Practice, 1890–91. By THOMAS SNOW, C. BURNEY, and F. A. STRINGER. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 8vo. cxciv and 1495 pp.

Supplement to the above; containing the Pay Office Statutes and Rules, Rules of the Supreme Court under Statutes (other than Judicature Acts), Lunacy Orders and Appeals to the House of Lords. 8vo. xiv and 202 pp.—At last the editors of the Annual Practice begin to find the burden of its bulk too great, and announce that it must somehow be reduced next year. We wish them a good deliverance.

La Justice dans les coutumes primitives. Par J. DECLAREUIL. Paris: Larose et Forcel. 1889. 8vo. 126 pp.—In this essay M. Declareuil has omitted two things: the one with at least plausible excuse, the other (we regret to say) with none. The omission which is not excusable is that of an index or table of contents. Nothing of the sort is provided, and the reader has to find his way in the book—a book embracing a good number and variety of details—as best he may. The more excusable omission is that M. Declareuil, in searching for the origins of legal justice, has paid very little attention to the customs of modern barbarians or savages, owing to the difficulty of ascertaining them. Not that accounts are wanting, but there are often conflicting accounts of the same race or even the same tribe. Maine had already called attention to the need of caution in generalizing from evidence of this kind. M. Declareuil, however, does not believe that the differences among the races of mankind are fundamental enough to impress different directions on the course of social evolution. Some races move faster and others slower; but the movement and the stages are in a general way the same. The points chiefly worked out by M. Declareuil are

the essentially voluntary character of all jurisdiction in its earliest forms (even the early kings of Rome, he maintains, had no regular jurisdiction except by consent); and the religious or sacerdotal character of early procedure. Under the latter head M. Declareuil does not notice the medieval history of the Court Christian, which might have furnished him with interesting matter for comparative study.

Studien aus dem Strafrecht. I. Von Professor J. KOHLER. Mannheim: J. Bensheimer, 1890.—This is a well enough printed book, but marvellously ill sewn, at least in the copy received by us, which resolved itself into loose sheets on the application of the paper-knife. Prof. Kohler discusses with his usual wide erudition such topics as the punishment of attempts, the limits within which mere omissions can be treated as punishable offences, the place of intention as an element in crime, liability for remote consequences, the punishment of accomplices and accessories, and offences against religion.

Étude sur la procédure criminelle en Angleterre et en Écosse. Par M. LUCIEN GUÉRIN. Paris: Pichon. 1890. 63 pp.—This tract testifies to the interest taken by French students of legal institutions in what is passing in foreign countries. M. Guérin gives a painstaking account of our criminal procedure, and has acquitted himself with ability of the difficult task of turning our quaint terminology into French equivalents.

De l'exécution des jugements étrangers. Par CHARLES LACHAU et CHRISTIAN DAGUIN. Paris: Larose et Forcel. 1889. xix, 240 pp.—This book is not only well composed, but has the no small merit of being, we believe, the most exhaustive contemporary treatise on French practice in respect of foreign judgments. There is no subject upon which accurate information is more necessary than upon this one, where concurrent action in the two countries has to be considered. MM. Lachau and Daguin have confined themselves to the task of stating the practice without digressing into the theoretical discussions which occasionally detract from the utility of French works on law.

A Treatise on the Office and Practice of a Notary of England. By RICHARD BROOKE. Fifth edition, by GEORGE F. CHAMBERS. London: Stevens & Sons. 1890. 8vo. xx and 404 pp.—This fresh edition of a well-known work is likely to be useful to mercantile men and their advisers in matters of everyday occurrence. It relates only to the mercantile side of a notary's duties, not to his ecclesiastical functions. It contains a short chapter on the antiquity of the office, which is truly a connecting link between past and modern institutions; but the value of the book will be in its practical directions and precedents.

A Practical Treatise on the Law relating to the Sale of Goods . . . . with the Factors Act, 1889. By C. E. STEWART. London: Effingham Wilson & Co. 1890. 8vo. 129 pp.—A semi-popular manual which may be found useful in County Court business and on other occasions when the reports and fuller text-books are not available. It is well arranged, and seems to be clear and sufficiently accurate for its purposes.

The Bills of Exchange Act, 1890. By THOMAS HODGINS, Q.C. Toronto: Rowsell & Hutchison. 1890. 8vo. xvi and 304 pp.—This Act of the Dominion Parliament is stated to be 'almost entirely a transcript' of our Bills of Exchange Act, 1882.

Oxford Lectures and other Discourses. By Sir Frederick Pollock, Part. London: Macmillan & Co. 1890. 8vo. viii and 303 pp.—This volume contains, in form or in substance, several Public Lectures delivered by the author at Oxford, including two which were first printed in this Review, and a later one on Sir Henry Maine which appeared in the *Contemporary Review.*

Greenwood's Manual of the Practice of Conveyancing. Eighth edition. Edited by Harry Greenwood. London: Stevens & Sons, Limited. 1891. 8vo. xxvi and 590 pp.

The Unwritten Constitution of the United States. By C. G. Tiedeman. New York: G. P. Putnam's Sons. 1890. 8vo. 165 pp.

The Law of Nuisances. By E. W. Garrett. London: W. Clowes & Sons, Limited. 1890. 8vo. xxvi and 548 pp.

A selection of Pettitt's and Blackwood's well-known *Diaries* and *Calendars* for 1891. (London: Griffith, Farran & Co.)

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(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

The English Historical Review. Vol. V, No. 20. London: Longmans, Green & Co.

Northumbrian Tenures (Prof. Maitland)—The growth of Oligarchy in English towns (C. W. Colby)—The English in the Levant (J. T. Bent)—The Salzburgers (Rev. E. B. Speirs)—Döllinger's Historical Work (Lord Acton).

Journal of the Institute of Bankers. Vol. XI. Parts 7–9. London: Blades, East & Blades.

Vagliano's case; The Factors Acts (J. R. Paget)—The Partnership Act, 1890 (Sir F. Pollock).

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The Science of Politics—its Methods and its Use, II (Æ. J. G. Mackay)—Land Registry in Ireland (J. Walker Craig, Q.C.)—The English Courts in relation to Scotland (T. Raleigh)—How to abolish Contraband (A. Wishart)—The work of the West Indian Commissioners, III (A. Wood Renton).

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No. 405. Lord Shand as a Judge—Judicial Slander—Succession to Personal Bonds as between Spouses.

No. 406. Mischievous Animals.

No. 407. Judicial Slander—Duelling in Germany and its punishment—A Judge's Trial.

No. 408. Speech as a mode of business.

The Scottish Law Review. Vol. VI. Glasgow: Wm. Hodge & Co.

No. 70. Judicial Work—Limited Liability—Public Rights of Way.

No. 71. Judicial Retirement—Limited Liability—'My Next-of-Kin' in Wills.

No. 72. The Scottish Bench—Limited Liability—Cancellation of stock certificates based on forged transfers—Credibility in cases of slander.

The Canada Law Journal. Vol. XXVI, Nos. 14–19. Toronto: The J. E. Bryant Co. Lim.

Wills avoided by marriage—Rights of Mortgagees against Mechanics' Liens—Grand Juries.

The Canadian Law Times. Vol. X, Nos. 11 & 12. Toronto: Carswell & Co.

The Salaries of the Judiciary—A model Court—Revocation of an Offer.

The Western Law Times. Vol. I, Nos. 5–8. Winnipeg, Manitoba: The Stovel Co.

The rise of Law in Rupert's Land—Legal Procedure in Manitoba—The Canadian Commonwealth, as it was and is—The Sheriffs of Assiniboia.

The Cape Law Journal. Vol. VII, Part 3. Grahamstown: Josiah Slater.

The Theory of the Judicial Practice—Can a Director part with his qualification shares?—The Brotherhood of the Bar—Registration of Brands on Cattle, &c.—Transvaal Gold Law.

The Green Bag. Vol. II. Boston: The Boston Book Co.

No. 9. Reminiscences of Lord Thurlow (with portrait)—The Supreme Court of Michigan (illustrated) (H. A. Chaney)—A Nice Question.

No. 10. Lord Lyndhurst (with portrait)—Evading the law—Dogs or men?—Supreme Court of Connecticut (with portraits)—Lawyer and Clerk (H. M. Doak)—Curious wills—Professional remuneration (Geo. F. Tucker)—Causes célèbres: Desrues—Taking the coif.

No. 11. Justice Samuel F. Miller (with portrait)—The Highest Courts of Law in New Hampshire (illustrated) (C. R. Corning).

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Electricity in its Medico-Legal Relations (Clark Bell)—Osmosis of Strychnia through Organic Tissues (Dr. G. B. Miller)—Hereuity Criminality, &c. v. Education (S. McClelland)—Delirium Tremens as a defence to Criminality (T. Crisp Poole)—Epilepsy as a defence for Crime (Prof. Elwell).

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M. Michaux-Bellaire (Obituary Notice)—De la domanialité publique à la Martinique et à l'île de la Réunion (Crémazy)—Les manieurs d'argent à Rome (Duméril)—Municipal Administration in Glasgow and Birmingham (René de Kerallain)—Civil Codes in Montenegro and Germany (Dickel).

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No. 5. Le fragmentum de formula Fabiana (Girard)—De quelques termes du droit public et du droit privé qui sont communs au celtique et au germanique (D'Arbois de Jubainville)—Les témoins mâles (Viollet)—Les sources du droit suédois jusqu'au XVe siècle (Beauchet).

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Zur Revision der Methode und Begriffsbestimmungen des Staatsrechtes (Hänsel)—Die staatsrechtliche Stellung Bosniens und der Herzegowina (Lingg)—Der Rechtsbegriff der Arbeiterversicherung (Rehm).

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Vol. XXXVII, Nos. 3–4. Prämienreserve bei der Lebensversicherung (Hecker)—Zur Lehre vom Kostgeschäft (Osner)—The German Draft Code on Partnership (Schledtmann)—Negotiable Instruments (Affolter).

Vol. XXXVIII, Nos. 1–2. Straccha und Santerna (Goldschmidt)—Der Reservefonds der Aktiengesellschaften (Neukamp)—Aeltere statutarische Aktienbezugsrechte (Riesser).

Archiv für Bürgerliches Recht. Vol. IV, Part I. Berlin: Carl Heymann.

Höhere Gewalt bei Wechselfristen (Koch)—Lebensversicherung zu Gunsten Dritter (Heck)—Zwangsvollstreckung in Schiffe (Mittelstein)—Lehre vom Dienstvertrag (Jacobi)—Ort der Generalversammlung (V. Volderndorff).

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Della causa illecita espressa in una disposizione di ultima volontà secondo il diritto romano (Costa)—Il potere esecutivo e la promulgazione delle leggi (Armanni)—Sopra due manoscritti della collezione pseudoisidoriana (Patetta).

Rivista Penale di Dottrina, Legislazione e Giurisprudenza. Series III. Bologna.

September. Sull' interpretazione e applicabilità dell' art. 433 del Codice Penale (Alpi)—Sull' interpretazione dell' art. 203 del Codice Penale (Mortara and Ruiz).

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Di una iscrizione dalmata (Gatti)—Le due citazioni delle istituzioni di Paolo trovate dal Signor P. Thomas (Scialoja)—Sulle citazioni di Paolo pubblicate dal Signor Thomas (Ferrini)—The Florentine MS. of the Digest (Scialoja)—La deditio e i dediticii aeliani (Segrè)—La L. 48 (49) Dig. III. 5, ed il requisito dell' *animus negotia aliena gerendi* nell' *actio negotiorum gestorum contraria* (Pacchioni)—Intorno all' Indice de' Digesti di Stefano (Ferrini)—Sul fr. 6 Dig. de exc. rei iudicatae 44. 2 (Manenti)—Il libro di diritto di Tubinga, secondo i manoscritti (Max Conrat).

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Decisions on Public Law in the Netherlands (H. Vos)—Local Legislation of 1889 (C. Krabbe).

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De acquisitieve verjaring van renten in het Oud-Brabantsch recht (Bezemer)—Oneigenlijke dwaling (Honwing)—German Draft Civil Code (Leonhard).

The Law Quarterly Review *does not undertake to exchange with or to notice publications which are not of a distinctly legal character.*

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

We are glad to hear, at the last moment before going to press, that a new scheme of legal education is practically decided upon by the Inns of Court. The details are not known to us; but the change, whatever it is, must be for the better.